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IN THE

Supreme Court of the United States

AK STEEL CORPORATION RETIREMENT ACCUMULATION PENSION PLAN AND AK STEEL CORPORATION BENEFIT PLANS ADMINISTRATIVE COMMITTEE

Petitioners,

v.

JOHN D. WEST, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit, in accord with the Seventh Circuit but in conflict with two other circuits and numerous state courts, was correct in holding that a pension plan participant may seek relief for a statutory violation of ERISA under ERISA § 502(a)(1)(B), even though that provision authorizes relief only for violations of "the terms of the plan."

2. Whether the Sixth Circuit, in accord with the Fourth Circuit but in conflict with four other circuits, was correct in holding that a court may apply the rule of *contra proferentem* to override a plan administrator's reasonable interpretation of a pension plan.

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JURISDICTION

The judgment of the court of appeals was entered on April 20, 2007. App., *infra*, 1a. The court of appeals denied a petition for rehearing on August 8, 2007. *Id.* at 34a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 502(a) and 502(e) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a) and (e), are reprinted in the appendix.

STATEMENT

Certiorari should be granted to resolve two important and recurring issues on which the circuits are divided. *First*, the Sixth Circuit, in accord with the Seventh Circuit, held that a participant in a pension plan may assert a claim for an alleged *statutory* violation of ERISA under ERISA § 502(a)(1)(B). By contrast, the Fifth Circuit, the Eighth Circuit, and numerous state courts have held that § 502(a)(1)(B) does *not* permit the assertion of statutory claims because the text of that provision refers explicitly to claims arising under "the terms of the plan." Under the approach adopted by the Sixth

and Seventh Circuits, state courts are authorized to interpret the provisions of ERISA, contrary to a deliberate Congressional decision to grant federal courts exclusive jurisdiction over such claims.

Second, the Sixth Circuit's decision, in accord with a decision of the Fourth Circuit, relies on the proposition that an ambiguity in a pension plan should be construed against its drafter. Four other circuits have held that where, as here, a pension plan grants its administrator discretionary authority to interpret the terms of the plan, ambiguities may *not* be resolved against the drafter. This Court recently called for the views of the Solicitor General on whether to grant a pending petition for certiorari presenting the same issue. *See AT&T Pension Benefit Plan* v. *Call*, 128 S. Ct. 350 (2007). Here, the issue is presented more squarely than in *Call*.

A. ERISA and Cash Balance Plans.

ERISA classifies pension plans as either defined contribution plans or defined benefit plans. A defined contribution plan is a plan under which an employee's benefit is based on an allocation of plan assets to an account that the plan maintains for the employee. ERISA § 3(34), 29 U.S.C. § 1002(34). All other pension plans are classified as defined benefit plans. ERISA § 3(35), 29 U.S.C. § 1002(35).

A cash balance plan is a type of defined benefit plan. *See* 26 C.F.R. § 1.401(a)(4)-8(c)(3)(i). Although a cash balance plan expresses an employee's benefit in the form of an account balance, the account balance does not represent an allocation of plan assets to an individual employee, as it would in a defined contribution plan. Instead, an account

balance in a cash balance plan reflects the amount of the pension benefit that the employee has earned under the plan's benefit formula. App., *infra*, 3a.

In a typical cash balance plan, an employee's account balance consists of two types of credits to the employee's account: pay credits and interest credits. *Id.* Pay credits typically are equal to a percentage of the employee's pay. *Id.* Interest credits are calculated by applying an interest rate to the employee's accumulated account balance. *Id.* Participants in cash balance plans usually may choose to receive their benefits in the form of either a lump sum payment or an annuity. *Id.* at 4a.

B. The AK Steel Plan.

Petitioners are the AK Steel Corporation Retirement Accumulation Pension Plan ("Plan") and its administrator, the AK Steel Benefit Plans Administrative Committee ("Plan Administrator").

The Plan is a typical cash balance plan. It provides a participating employee with a cash balance account made up of pay credits and interest credits. App., *infra*, 88a-89a. Upon retirement, a participant in the Plan may elect to receive his or her benefit in any of three forms: (1) a lump sum payment equal to the participant's account balance, (2) an annuity of equivalent value, or (3) a partial lump sum and partial annuity. *Id.* at 90a.

The Plan vests the Plan Administrator with "full discretionary authority and the power to administer and construe the provisions of the Plan, to determine in its discretion any questions of law or fact arising under the Plan . . . and to authorize the

payment of benefits properly due under the terms of the Plan . . . ." App., *infra*, 92a.

C. West's Whipsaw Claim.

Respondent John D. West was employed by a predecessor of AK Steel Corporation until 1997, when he took early retirement at the age of 57. Upon his retirement, West elected to receive his pension benefit in a lump sum. West acknowledged in writing "that he understood his payment options and was making a fully informed decision to receive his benefits in the form of a lump sum distribution equal to his account balance." App., *infra*, 9a-10a.

On August 1, 1997, West received a lump sum payment equal to his account balance. C.A. App. 173-75. Three years later, West filed a claim with the Plan Administrator asking for a payment *greater* than his account balance. *Id.* West asserted that he was entitled to an additional payment on the ground that ERISA required the Plan to determine his lump sum payment using a "whipsaw" calculation. *Id.*

Whipsaw calculations are sometimes used to calculate lump sum payments to participants in cash balance plans who elect to receive their pension benefits before reaching the "normal retirement age" specified by the plan. The calculation has two steps:

- In the first step – known as the "project-forward" step – the employee's account balance is projected forward in time to the employee's normal retirement age (typically age 65) and converted into a retirement annuity. App., *infra*, 7a.

- In the second step – known as the "discount-back" step – the life annuity is converted into a lump sum payment by discounting the annuity back to its present value at the time of the lump sum payment. *Id.*

According to the whipsaw theory, the interest rate used in the project-forward step is the interest rate that the plan would use to calculate an annuity for an employee who elected to receive benefits in the form of an annuity beginning at normal retirement age. App., *infra*, 18a. The discount-back step, in contrast, uses the interest rate specified by § 417(e)(3) of the Internal Revenue Code ("IRC"). *Id.* When the interest rate used in the project-forward step exceeds the interest rate used in the discount-back step, the whipsaw calculation produces a lump sum payment that is *greater* than the employee's account balance. *Id.* at 7a.

The following table illustrates this effect for certain of the accounts in the AK Steel Plan. As shown in the table, the whipsaw calculation can produce a dramatic increase in an employee's lump sum payment. The size of the increase varies inversely with an employee's age.

Age of employee upon termination of employment	Lump sum payment ***without*** whipsaw calculation	Lump sum payment ***with*** whipsaw calculation
25	$10,000	$29,578
35	$10,000	$23,756
45	$10,000	$19,175
55	$10,000	$15,749
60	$10,000	$14,451

C.A. App. 422, 429.[1]

In April 2001, the Plan Administrator denied West's whipsaw claim on the ground that, under section 4.1(a) of the Plan, all West was entitled to receive was his account balance. C.A. App. 315. Following the denial of his administrative claim, West filed a class action in the Southern District of Ohio seeking whipsaw payments for himself and the class.[2]

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[1] The table illustrates the whipsaw calculation using the interest rates that applied to "Opening Accounts" in the Plan as of 2002, when the table was prepared.

[2] The Pension Protection Act of 2006 abolished the whipsaw calculation for all "distributions" from a pension plan made after the date of the Act's enactment. *See* App., *infra*, 9a, 31a; Pension Protection Act of 2006 § 701(e)(2), Pub. L. No. 109-280, 120 Stat. 780, 991 (2006). Here, although the whipsaw distribution sought by West had *not* been made by the date of enactment, the Sixth Circuit declined to apply the Act to West's claim, citing concerns about retroactivity. App., *infra*, 32a. The court thus frustrated the Act's goal of preventing further use of

(footnote cont'd)

D. Proceedings Below.

This petition presents two recurring and important issues that have divided the courts of appeals – one concerning the proper construction of ERISA § 502(a)(1)(B), and the other concerning whether ambiguities in pension plans should be construed against the drafter.

1. West's claim that ERISA overrides the terms of the Plan.

West's claim is rooted in the ERISA concept of an "accrued benefit." ERISA defines an "accrued benefit" as the benefit that an employee will receive if he elects to receive his benefit in the form of an annuity beginning at "normal retirement age." *See* ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A). The Plan, like many other ERISA plans, defines "normal retirement age" as age 65. App., *infra*, 81a. West argued that, under ERISA, he was entitled to a lump sum payment that was the "actuarial equivalent" of his "accrued benefit," *i.e.*, of the annuity he could have elected to receive at age 65. *Id.* at 10a, 42a-43a. He claimed that the lump sum payment he received from the Plan was worth significantly *less* than the actuarial equivalent of such an annuity. *Id.* He sued to recover the difference.

As West acknowledged in the district court (C.A. App. 160-61), his claim is a statutory claim, not a plan terms claim. The terms of the Plan do not

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a calculation that Congress deemed harmful. *See* 152 Cong. Rec. S8747, S8756 (Aug. 3, 2006). While Petitioners disagree with the court's interpretation of the Act, that is not the basis of this petition.

require an employee's lump sum payment to be the actuarial equivalent of the employee's age-65 annuity. To the contrary, the Plan expressly states that lump sum payments shall *not* be calculated as the actuarial equivalent of an employee's age-65 annuity. App., *infra*, 94a (Plan Ex. I-C). The Plan instead provides that lump sum payments shall be equal to an employee's account balance. *Id.* at 90a. According to West, ERISA overrides the Plan's terms and requires an employee's lump sum payment to be the actuarial equivalent of the employee's age-65 annuity. App., *infra*, 8a.

The district court agreed. The district court recognized that, under the Plan, "[t]he amount of the lump sum disbursement is equal to the amount of a participant's hypothetical account balance." App., *infra*, 38a. The court nonetheless held that, under ERISA, the lump sum disbursement "must be the actuarial equivalent of the annual benefit the participants would have received at normal retirement age." *Id.* at 41a. The court ordered the Plan to pay class members the difference between the lump sum payments they received under the Plan and the lump sum payments the court found to be due under ERISA – a total of $37 million, plus interest. *Id.* at 70a. The Sixth Circuit affirmed. *Id.* at 1a.

2. The Sixth Circuit's interpretation of § 502(a)(1)(B).

West asserted his claim under two ERISA remedial provisions: §§ 502(a)(1)(B) and 502(a)(3). Section 502(a)(1)(B) authorizes relief only for a violation of plan terms. Specifically, it authorizes a plan participant to bring a civil action:

> to recover benefits due to him *under the terms of his plan*, to enforce his rights *under the terms of his plan*, or to clarify his rights to future benefits *under the terms of the plan*.

29 U.S.C. § 1132(a)(1)(B) (emphasis added).

Section 502(a)(3) authorizes a participant to seek relief under *either* plan terms *or* ERISA provisions, but it permits only equitable relief, not money damages. The provision states that a participant may bring a civil action:

> (A) to enjoin any act or practice which violates *any provision of this title or the terms of the plan*, or (B) to obtain other appropriate equitable relief (i) to redress such violations, or (ii) to enforce *any provision of this title or the terms of the plan*.

29 U.S.C. § 1132(a)(3) (emphasis added).

The Sixth Circuit correctly held that West could not proceed under § 502(a)(3) because he failed to seek equitable relief in the Complaint. *See* App., *infra*, 12a-13a. The court stated:

> The prayer for relief . . . centers on money damages for the alleged underpayment of a benefit. Although the plaintiffs also request unspecified "other relief as may be deemed just and equitable," that phrase is found in the portion of the complaint requesting costs and attorney fees. This is insufficient to assert a proper equitable claim under § 502(a)(3) where the "heart of the plaintiff's

> prayer for relief was a request for recovery of additional lump sum benefits."

Id. at 13a (citation omitted).

Having failed properly to invoke § 502(a)(3), West's only remaining recourse was to characterize his claim as a plan terms claim that may be asserted under § 502(a)(1)(B). In addressing that argument, the Sixth Circuit acknowledged that West's claim is a statutory claim and not a claim based on plan terms. *See* App., *infra*, 8a, 10a, 26a-27a. The court also recognized that § 502(a)(1)(B) "offers redress only for the recovery of benefits . . . under the terms of the Plan." *Id.* at 17a. The court was concerned, however, that if West were *not* permitted to proceed under § 502(a)(1)(B), he would have no remedy at all. *Id.* at 16a.[3] The court thus concluded that West's statutory claim could be characterized as a plan terms claim and asserted under § 502(a)(1)(B) on the theory that "the terms of the plan must . . . comply with ERISA." *Id.* at 17a.

3. The Sixth Circuit's reliance on *contra proferentem*.

In addition to holding that West could proceed under § 502(a)(1)(B), the Sixth Circuit rejected an interpretation of the Plan under which the Plan could have paid out lump sums equal to participant account balances without violating ERISA. The court rejected that interpretation of the Plan by

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[3] The Sixth Circuit's concern in this regard was unfounded. Although West did not avail himself of it, a potential avenue of relief was available to him. *See infra* at n. 7.

relying on *contra proferentem* – the canon of construction holding that ambiguities in a contract are construed against the drafter.

A Treasury Regulation divides defined benefit plans into two categories: those that express an employee's benefit "in the form of an [annuity] commencing at normal retirement age," and those that express benefits in any other form. *See* 26 C.F.R. § 1.411(a)-7(a)(1)(i) & (ii). Significantly, for plans that express benefits in a form *other* than an annuity beginning at normal retirement age, ERISA provides that the project-forward step of the whipsaw calculation must be done using the *same* interest rate as is used in the discount-back step.[4]

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[4] The Treasury Regulation interprets parallel definitions of "accrued benefit" in the Internal Revenue Code and ERISA. *See* 26 U.S.C. § 411(a)(11); 29 U.S.C. § 1002(23)(A); *see also* 29 U.S.C. § 1202(c). The regulation provides that, for plans that express a benefit in a form *other* than an annuity beginning at normal retirement age, a participant's "accrued benefit" for statutory purposes is "an annual benefit commencing at normal retirement age which is the *actuarial equivalent* (determined under Section 411(c)(3) . . . *of the accrued benefit determined under the plan.*" 26 C.F.R. § 1.411(a)-7(a)(1)(ii) (emphasis added). In other words, when the plan does not express a benefit in the form of an age-65 annuity, the benefit expressed by the plan is projected forward into an actuarially equivalent age 65-annuity. Actuarial equivalence is "determined under section 411(c)(3)," *id.*, and the latter provision adopts the interest rate specified by IRC § 417(e)(3) for actuarial equivalence calculations. *See* 26 C.F.R. § 1.411(c)-1(e)(1) (actuarial equivalence shall be as "determined by the Commissioner"); IRS Announcement 95-33 ¶ 362.1(1)(a), 1995 WL 223244 (IRS Ann. May 8, 1995) (actuarial

(footnote cont'd)

When the interest rates used in the project-forward and the discount-back steps are the same, the two steps cancel each other out, and the whipsaw calculation becomes "a complete wash." App., *infra*, 25a-26a. In these circumstances, a cash balance plan may pay out lump sums equal to a participant's account balance without violating ERISA. *See id.*

Here, the Plan Administrator construed the Plan as one that expresses a participant's benefit in the form of an account balance, not in the form of an annuity beginning at normal retirement age. C.A. App. 348-49, 389-90, 435-36. So interpreted, the Plan is one for which ERISA provides that the forwards and backwards steps of the whipsaw calculation use the same interest rate.

The Sixth Circuit acknowledged Petitioner's argument that under the Plan Administrator's interpretation of the Plan, the Plan would not violate ERISA. App., *infra*, 25a-26a. The court rejected the Plan Administrator's interpretation, however, observing that any ambiguity between Plan terms that support this interpretation and Plan terms that contradict it "must be resolved in the plaintiffs' favor" under the doctrine of *contra proferentem*. *Id.* at 26a (citation omitted).

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equivalence is determined using § 417(e)(3) interest rate). The § 417(e)(3) interest rate is the same interest rate as is used in the discount-back step of the whipsaw calculation.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Decision Exacerbates A Circuit Split On The Scope Of § 502(a)(1)(B).

This Court should grant certiorari to resolve a circuit split on the scope of § 502(a)(1)(B). The text of that provision authorizes relief only for violations of "the terms of a plan." 29 U.S.C. § 1132(a)(1)(B). The Fifth Circuit, the Eighth Circuit, and the courts of several states have therefore held that § 502(a)(1)(B) applies only to claims based on plan language and does *not* apply to statutory claims. In the decision below, by contrast, the Sixth Circuit aligned itself with the Seventh Circuit and held that § 502(a)(1)(B) *does* apply to statutory claims.

Resolution of this circuit split is exceptionally important because the erroneous approach of the Sixth and Seventh Circuits allows state courts to interpret and apply the provisions of ERISA, thus frustrating a deliberate Congressional decision to restrict the interpretation of ERISA exclusively to the federal courts.

A. The circuits are divided on whether statutory claims may be asserted under § 502(a)(1)(B).

The remedial provisions of ERISA § 502(a) draw an explicit distinction between claims based on "the terms of the plan" and claims based on the "provisions of [ERISA]." Section 502(a)(1)(B) authorizes relief only for violations of "the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Section 502(a)(3), in contrast, authorizes relief for violations of *either* "any provision of this title *or* the terms of

the plan." 29 U.S.C. § 1132(a)(3) (emphasis added). Section 502(a)(5) authorizes relief only for violations of "any provision of this title." 29 U.S.C. § 1132(a)(5).

Most courts hold that this statutory language distinguishes claims based on plan language from claims based on ERISA provisions. These courts, which include the Fifth Circuit, the Eighth Circuit, and numerous state courts, have therefore held that only claims based on plan language may be asserted under § 502(a)(1)(B). *See Ross* v. *Rail Car Am. Group Disability Income Plan*, 285 F.3d 735, 740, 742 (8th Cir. 2002); *Carrabba* v. *Randalls Food Mkts. Inc.*, 252 F.3d 721 (5th Cir. 2001). *See also Todisco* v. *Verizon Commc'ns, Inc.*, 497 F.3d 95, 101 (1st Cir. 2007) (rejecting § 502(a)(1)(B) claim because plaintiff's "claim for benefits is plainly not a suit for benefits *under the terms of the plan*. Instead, she expressly seeks benefits *not* authorized by the plan's terms") (emphasis in original).

State courts that have reached the same conclusion include *Bodine* v. *Webb*, 992 S.W.2d 672, 675, 677 (Tex. App. 1999), *review denied* (Tex. Sept. 9, 1999) (§ 502(a)(1)(B) does not authorize action seeking recalculation of benefits based on alleged statutory violations of ERISA.); *Oddino* v. *Oddino*, 939 P.2d 1266, 1273 (Cal. 1997) ("Congress clearly intended that actions to enforce rights created by ERISA's title I would be limited to federal courts.") (emphasis omitted)); *Richland Hosp., Inc.* v. *Ralyon*, 516 N.E.2d 1236, 1241 (Ohio 1987) (§ 502(a)(1)(B) does not grant state courts jurisdiction over actions for violations of ERISA statutory duties.); *Duffy* v. *Brannen*, 529 A.2d 643, 650 (Vt. 1987) (§ 502(a)(1)(B) does not extend to claim requiring "construction and

implementation of standards of conduct established by ERISA."); *Summers* v. *United States Tobacco Co.*, 574 N.E.2d 206, 210-11 (Ill. App. Ct. 1991) (§ 502(a)(1)(B) does not authorize actions based on "violations of ERISA."); *Young* v. *Sheet Metal Workers' Int'l Ass'n Prod. Workers Welfare Fund*, 447 N.Y.S.2d 798, 803 (N.Y. Sup. Ct. 1981) (§ 502(a)(1)(B) does not apply to "any action wherein the participant or beneficiary seeks to challenge the validity of a portion of a plan itself; or [that] seeks a construction of the ERISA statute itself.").

Ross is illustrative of these cases. There, the plaintiff sought additional benefits on the ground that a plan amendment curtailing his benefits had been adopted in violation of the statutory requirements for amending a pension plan. 285 F.3d at 739-741. The plaintiff argued that this was a claim under § 502(a)(1)(B) for "benefits due under the terms of the plan." The Eighth Circuit disagreed, reasoning that the claim was a statutory claim and not a plan terms claim:

> Although [the plaintiff's] ultimate goal is to continue receiving disability income benefits from Canada Life, section 502(a)(1)(B) authorizes a participant to bring an action to recover benefits, enforce rights, or clarify rights to future benefits *under the terms of the plan*. Ross is not seeking to obtain benefits under the terms of the Plan. Rather, he is seeking to reform the Plan by obtaining a declaration that the purported 1990 and 1991 amendments are void. Section 502(a)(1)(B) does not authorize such a claim.

Id. at 740 (emphasis added). The plaintiff was therefore limited to seeking relief under the separate provisions of § 502(a)(3). *Id.* at 741 & n.7.

Similarly, in *Carraba*, the plaintiff class contended that the plan had failed to pay benefits in accordance with ERISA's accrual and vesting provisions. *Carraba*, 145 F. Supp. 2d 763, 770 (N.D. Tex. 2000), *aff'd*, 252 F.3d 721 (5th Cir. 2001). The court held that § 502(a)(1)(B) did not provide a remedy because plaintiffs had already received "basically everything to which they were entitled under the provisions of the [plan]." *Id.* Since plaintiffs were seeking relief under ERISA provisions, not plan language, their recourse was to seek relief under ERISA § 502(a)(3). *See id.* The Fifth Circuit affirmed, adopting the district court's opinion. 252 F.3d at 722.

The holdings in *Ross*, *Carraba*, and the state court decisions cited at pp. 14-15, *supra*, squarely conflict with the decision of the Sixth Circuit in this case. Here, West is asserting a statutory claim, not a plan terms claim. West argues "that ERISA mandates the whipsaw calculation . . . and that AK Steel's failure to calculate lump-sum distributions in this manner constitutes a statutory violation of ERISA." App., *infra*, 8a.[5] The Sixth Circuit

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[5] West argued in the district court that:

> The claim in this case does not seek an interpretation of the plan. Rather, plaintiffs' claim is that the Plan itself violates ERISA and the Internal Revenue Code – specifically, that the method provided in the Plan for lump sum

(footnote cont'd)

nonetheless characterized West's claim as a plan terms claim that may be asserted under § 502(a)(1)(B). *Id.* at 17a. The only explanation that the court offered for this conclusion is the terse observation that "the terms of the plan must comply with ERISA." *Id.*

In accord with the decision in this case, the Seventh Circuit likewise holds that statutory claims may be asserted under § 502(a)(1)(B). *See Berger* v. *Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 763 (7th Cir. 2003) (permitting ERISA statutory claim to be asserted under § 502(a)(1)(B)); *May Dep't Stores Co.* v. *Fed. Ins. Co.*, 305 F.3d 597, 601, 602 (7th Cir. 2002) (characterizing ERISA statutory claim as a plan terms claim on the theory that a pension plan contains terms "implied by law" under ERISA).[6] The interpretation of § 502(a)(1)(B) adopted by the Sixth and Seventh Circuits effectively eliminates § 502(a)'s explicit distinction between claims arising under "the terms of the plan" and claims arising under the "provisions of [ERISA]." Under that interpretation, statutory claims may be re-cast as plan terms claims and asserted under

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distributions violates ERISA § 204(c)(3) and I.R.C. § 417(e).

C.A. App. 160-61.

[6] The Sixth Circuit's decision states that the Second Circuit held that statutory claims may be asserted under § 502(a)(1)(B) in *Esden* v. *Bank of Boston*, 229 F.3d 154 (2d Cir. 2000). App., *infra*, 17a. Actually, *Esden* does not explicitly address whether the plaintiff was permitted to proceed under § 502(a)(1)(B) or § 502(a)(3). *See* 229 F.3d at 161-62.

§ 502(a)(1)(B) simply by positing that the terms of the plan "implicitly" incorporate the provisions of ERISA.

The Sixth and Seventh Circuit decisions also depart from this Court's precedent governing the interpretation of ERISA § 502(a). "The six carefully integrated civil enforcement provisions found in § 502(a)" are part of ERISA's "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated' statute." *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985). This Court has cautioned against "tamper[ing] with an enforcement scheme crafted with such evident care as the one in ERISA." *Id.* at 147. The Court has likewise warned against expansive interpretations of § 502(a) that attempt to "adjust the balance" struck by Congress in the text of ERISA. *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 263 (1993). The Sixth and Seventh Circuits disregarded these principles in holding that statutory claims may be re-cast as plan terms claims and asserted under § 502(a)(1)(B).[7]

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[7] The Sixth Circuit appears to have been concerned that there is no remedy for a claim like West's if the claim cannot be asserted under § 502(a)(1)(B). App., *infra*, 16a. In reality, although West elected not to pursue it, a potential avenue of relief was available to him. He could have (1) sought an equitable reformation of the Plan under § 502(a)(3) to conform the Plan to the provisions of ERISA, and then (2) invoked § 502(a)(1)(B) to seek benefits due under the terms of the Plan as reformed. Equitable reformation of a plan that violates ERISA is available under § 502(a)(3) to a plaintiff who demonstrates that such relief is "equitable" and

(footnote cont'd)

The writ should be granted to resolve the conflict between the Sixth and Seventh Circuits' interpretation of § 502(a)(1)(B) and the contrary interpretation adopted by the Fifth Circuit, the Eighth Circuit, and numerous state courts.

B. The Sixth Circuit's decision presents a recurring issue of exceptional importance.

The Sixth Circuit's decision that statutory claims may be asserted under § 502(a)(1)(B) allows state courts to interpret and apply ERISA's statutory requirements. The decision thus violates one of the core tenets of ERISA: that federal courts have exclusive jurisdiction to interpret the ERISA statutory scheme.

In enacting ERISA, Congress sought to create "a uniform regulatory regime over employee benefit plans" and to ensure that "employee benefit plan regulation would be 'exclusively a federal concern.'" *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004) (citation omitted). Accordingly, rather than allowing the courts of fifty different states to interpret ERISA's statutory requirements, Congress provided that federal courts will ordinarily have exclusive

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"appropriate." *See* 29 U.S.C. § 1132(a)(3); *Nechis* v. *Oxford Health Plans, Inc.*, 421 F.3d 96, 103 (2d Cir. 2005); *see also City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702 (1978); *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans* v. *Norris*, 463 U.S. 1073 (1983) (per curiam). Here, West bypassed any attempt to reform the Plan and instead sought to assert his statutory claim *directly* under § 502(a)(1)(B).

jurisdiction over ERISA claims. *See* ERISA § 502(e)(1).

Congress created a limited exception to the general rule of exclusive federal jurisdiction: it vested state and federal courts with concurrent jurisdiction over claims asserted under § 502(a)(1)(B). *See* ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).[8] Congress created this exception because it understood that § 502(a)(1)(B) claims would be limited to the interpretation of plan language and would not involve construction of the ERISA statutory scheme. As the Conference Report on ERISA explains:

> The U.S. district courts are to have exclusive jurisdiction with respect to actions involving breach of fiduciary responsibility as well as exclusive jurisdiction over other actions to enforce or clarify benefit rights

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[8] ERISA § 502(e)(1) provides:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1). State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

29 U.S.C. § 1132(e)(1). ERISA § 502(a)(7) authorizes state governments to enforce certain child support orders. 29 U.S.C. § 1132(a)(7).

> provided under [ERISA]. However, with respect to suits to enforce benefit rights under the plan or to recover benefits under the plan *which do not involve application of [ERISA] provisions*, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction . . . .

H.R. Conf. Rep. No. 93-1280 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5107 (emphasis added).

The decisions of the Sixth and Seventh Circuits disrupt this carefully crafted allocation of jurisdiction. According to those courts, statutory claims can be asserted under § 502(a)(1)(B), which means that such claims may be heard and decided in state court. The Sixth and Seventh Circuits appear to have given no consideration to the fact that their interpretation of § 502(a)(1)(B) opens up state courts for the adjudication of the ERISA statutory scheme.

Consistent with the text of § 502(a)(1)(B), state courts have until now interpreted their jurisdiction under ERISA to be limited to cases involving "the terms of a plan." The decisions of the Sixth and Seventh Circuits, however, instruct state courts to ignore that restriction and to decide disputes about the meaning of ERISA provisions. Allowing the courts of fifty different states to interpret and apply the complex provisions of ERISA would thwart the Congressional goal of creating a uniform *federal* scheme of pension regulation. It would also place a heavy burden on this Court to police the interpretation of ERISA by the courts of the fifty states.

Whether statutory claims may be asserted under § 502(a)(1)(B) is an issue that will continue to

arise in disputes about a wide variety of ERISA provisions.[9] In the absence of corrective action by this Court, ERISA's fundamental goal of creating a uniform national scheme of pension regulation will be frustrated.

II. The Sixth Circuit's Decision Exacerbates A Circuit Split On The Applicability Of *Contra Proferentem* In Interpreting A Pension Plan.

In *Firestone Tire & Rubber Co.* v. *Bruch*, this Court held that "a deferential standard of review" is appropriate when "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. 101, 111, 115 (1989). Following *Firestone*, courts have deferred to the interpretation of a plan administrator who is given discretion to interpret the plan. *E.g.*, *McElroy* v. *SmithKline Beecham Health & Welfare Benefits Trust Plan*, 340 F.3d 139, 143 (3d Cir. 2003) ("[T]he plan administrator was authorized to interpret it, and we must defer to this interpretation unless it is arbitrary or capricious.").

Here, notwithstanding *Firestone*, the Sixth Circuit rejected a reasonable interpretation of the Plan by the Plan Administrator that would have avoided the alleged violation of ERISA. The court

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[9] A survey on Lexis or Westlaw confirms that disputes arising under ERISA's vesting, age discrimination, anti-backloading, anti-cutback, and plan amendment provisions, among others, are arising with increasing frequency in the lower courts.

rejected the administrator's interpretation by applying *contra proferentem* to resolve an alleged ambiguity in the Plan against the Plan's drafter. App., *infra*, 27a (holding that "the ambiguity must be resolved in the plaintiffs' favor").

By applying *contra proferentem* to a plan that vests its administrator with discretion to interpret the terms of the plan, the Sixth Circuit exacerbated an acknowledged split among the circuits. *See ERISA Fiduciary Law* 177 (Susan P. Serota & Frederic A. Brodie eds., 2d ed. 2006) ("Controversy has arisen [among the circuits] from application of the doctrine of *contra proferentem*."). This Court has already called for the views of the Solicitor General on whether to grant certiorari in another case that presents the same issue less squarely than this case.[10]

Four circuits hold that the doctrine of *contra proferentem* cannot be applied where, as here, the plan vests the plan administrator with discretion to construe the plan's terms. Two other circuits, including the Sixth Circuit in this case, hold that the doctrine *can* be applied in those circumstances. Finally, two circuits have adopted a hybrid approach under which *contra proferentem* may be applied to

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[10] *See AT&T Pension Benefit Plan* v. *Call*, No. 06-1398, 128 S. Ct. 350 (2007). In *Call*, the Seventh Circuit invoked "the principle that ambiguities in a contract that remain after extrinsic evidence has been presented are resolved against the party who drafted the contract." *Call* v. *Ameritech Mgmt. Pension Plan*, 475 F.3d 816, 822 (7th Cir. 2007). *Cf. Hess* v. *Reg-Ellen Mach. Tool Corp.*, 423 F.3d 653, 662 (7th Cir. 2005).

arrive at a "correct" interpretation of the plan to be used in evaluating whether the plan administrator abused its discretion in interpreting the plan. The Court should grant certiorari to settle this division among the circuits.

A. The circuits are divided on the *contra proferentem* issue.

The Second, Eighth, Ninth, and Tenth Circuits hold that *contra proferentem* does not apply to an ERISA plan that the administrator is given discretion to interpret. The holdings of these circuits conflict with the Sixth Circuit's reliance on *contra proferentem* in this case and with a similar holding of the Fourth Circuit.

1. In *Kimber* v. *Thiokol Corp. Disability Benefit Plan*, the Tenth Circuit rejected the use of *contra proferentem* in cases in which the plan administrator is given discretion to interpret the plan. 196 F.3d 1092, 1100 (10th Cir. 1999). The court observed that, "when a plan administrator has discretion to interpret the plan and the standard of review is arbitrary and capricious, the doctrine of *contra proferentem* is inapplicable." *Id.*

The Second Circuit is in accord, holding that "application of the rule of *contra proferentem* is limited to those occasions in which this Court reviews an ERISA plan *de novo*." *Pagan* v. *NYNEX Pension Plan*, 52 F.3d 438, 443-44 (2d Cir. 1995). When applying "the highly deferential arbitrary and capricious standard . . . the rule of *contra proferentem* is inapplicable." *Id.*

The Ninth Circuit's opinion in *Winters* v. *Costco Wholesale Corp.* is also in accord, holding

"that the rule of *contra proferentem* is not applicable to self-funded ERISA plans that bestow explicit discretionary authority upon an administrator to determine eligibility for benefits or to construe the terms of the plan." 49 F.3d 550, 554 (9th Cir. 1995). The Ninth Circuit noted that "*contra proferentem* 'is based upon the principle of contract construction that when one party is responsible for the drafting of an instrument, absent evidence indicating the intention of the parties, any ambiguity will be resolved against the drafter.'" *Id.* (citation omitted and emphasis supplied). But where a plan vests its administrator with discretion to construe disputed terms, the plan itself "states how Plan terms are to be interpreted, and the general rule of *contra proferentem* does not apply." *Id.*

The Eighth Circuit too has held, in *Wallace* v. *Firestone Tire & Rubber Co.*, that "unless the plan language specifies otherwise, courts should construe any disputed language without deferring to either party's interpretation." 882 F.2d 1327, 1329 (8th Cir. 1989) (quotation omitted).

2. In contrast to these circuits, the Sixth and Fourth Circuits apply *contra proferentem* even when the plan grants the plan administrator discretion to interpret the plan.

The Sixth Circuit here concluded that the definition of "accrued benefit" in section 1.2 of the AK Steel Plan is "clear" if that section is considered in isolation. App., *infra*, 26a. The court acknowledged, however, that Petitioner had argued that other provisions of the Plan, considered together with section 1.2, support Petitioner's interpretation of the Plan. *Id.* Rather than determining whether

Petitioner's interpretation of all of the Plan's provisions was an abuse of discretion, the court of appeals dismissed Petitioner's argument by applying the principle of *contra proferentem*:

> To the extent that the Plan's language with respect to lump-sum distributions is ambiguous in that it conflicts with the definition of "accrued benefit" in another section of the Plan, the ambiguity must be resolved in the plaintiff's favor. *See Regents of the Univ. of Mich.* v. *Employees of Agency Rent-A-Car Hosp. Ass'n*, 122 F.3d 336, 340 (6th Cir. 1997) ("[A]ny ambiguities in the language of the [ERISA] plan [are to] be construed strictly against the drafter of the plan.").

App., *infra*, 26a.

The Fourth Circuit has similarly held that a plan administrator's interpretation may be an abuse of discretion if the administrator has not applied *contra proferentem*: "[A] reasonable administrator-insurer would look to an important external standard for interpreting an ambiguous contractual provision – that it be construed against the drafting party." *Carolina Care Plan, Inc.* v. *McKenzie*, 467 F.3d 383, 388 (4th Cir. 2006); *see also McKeldin* v. *Reliance Std. Life Ins. Co.*, No. 06-1743, 2007 U.S. App. LEXIS 24289, at *8 (4th Cir. Oct. 17, 2007) (unpublished) ("[W]hen, as here, an ERISA plan vests discretion in the decision-maker, who also insures the plan, reasonable exercise of that discretion requires that the decision-maker/insurer 'construe plan ambiguities against the party who drafted the plan.'").

3. Further exacerbating the split among the circuits, the Fifth and Eleventh Circuits have adopted a hybrid approach. These courts apply *contra proferentem* to determine the "correct" interpretation of the plan, and may invalidate a contrary but reasonable interpretation of a plan administrator if the interpretation favors the plan and the administrator has a conflict of interest. *See HCA Health Servs. of Ga., Inc.* v. *Employers Health Ins. Co.*, 240 F.3d 982, 993-94 (11th Cir. 2001); *Rhorer* v. *Raytheon Eng'rs & Constructors, Inc.*, 181 F.3d 634, 639 (5th Cir. 1999).

B. The issue is recurring and important.

Whether ambiguities in a pension plan must be construed against the drafter is a question that can arise in virtually any case involving a claim for benefits alleged to be due under the terms of a plan. The answer to that question, moreover, could determine the outcome of many such cases. The writ should be granted to resolve the conflict among the circuits on this recurring and important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN D. WEST, on behalf of himself and all others similarly situated,

Plaintiff-Appellee,

v.

AK STEEL CORPORATION (formerly Armco Inc.) RETIREMENT ACCUMULATION PENSION PLAN and AK STEEL CORPORATION BENEFIT PLANS ADMINISTRATIVE COMMITTEE,

Defendants-Appellants.

No. 06-3442

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.
No. 02-0001—Sandra S. Beckwith, Chief District Judge

Argued: March 16, 2007

Decided and Filed: April 20, 2007

Before: COLE, CLAY, and GILMAN, Circuit Judges.

RONALD LEE GILMAN, Circuit Judge. This is a class action lawsuit brought by early retirees in the AK Steel Corporation Retirement Accumulation Pension Plan (AK Steel Plan) who elected to receive their pension benefits under the Plan in the form of a lump-sum payment. The AK Steel Plan is a cash balance plan specifying that participants can elect to receive a lump sum equal to their "account balance" at the termination of employment rather than hav-

ing to wait until they reach the normal retirement age of 65. According to the plaintiffs, the AK Steel Plan's failure to use what is known as the "whipsaw calculation" when determining the value of the lump-sum distributions for these early retirees caused a forfeiture of benefits in violation of the Employment Retirement Income Security Act (ERISA).

The district court, in April of 2004, granted partial summary judgment in favor of the plaintiffs on the issue of liability. A year and a half later, the district court awarded the plaintiffs over $37 million in damages and more than $9 million in prejudgment interest. AK Steel timely appealed. For the reasons set forth below, we AFFIRM the judgment of the district court.

I. BACKGROUND

A. The AK Steel Plan

ERISA specifies that employee benefit plans are subject to "minimum standards . . . assuring the equitable character of such plans and their financial soundness." ERISA § 2(a), 29 U.S.C. § 1001. Under ERISA, a pension plan is either a defined contribution plan or a defined benefit plan. ERISA §§ 3(34), 3(35), 29 U.S.C. § 1002 (34), (35). A defined contribution plan "provide[s] for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account . . . ." ERISA § 3(34), 29 U.S.C. § 1002 (34). In other words, an employee's retirement benefit is the eventual value of his or her account to which contributions have been made by the employer and/or the employee.

Any other type of pension plan is a defined benefit plan. ERISA § 3(35), 29 U.S.C. § 1002(35). Under a defined benefit plan, an employee's benefit is an amount, either in the form of an annuity or a lump-sum payment, equal to a specified percentage of the employee's salary in the final years of his or her employment. The AK Steel Plan at issue in the present case is a hybrid of both a defined contribution plan and a defined benefit plan known as a "cash balance plan," but is classified under ERISA as a defined benefit plan.

"A cash balance plan is a defined benefit plan that possesses many of the characteristics of a defined contribution plan." Robert Rachal, Russell L. Hirschhorn & Nicole Eichberger, *Cases and Issues in Cash Balance Plan Litigation*, 22 Lab. Law. 19, 21 (2006). Cash balance plans mimic traditional defined benefit plans in that participants do not typically make any contributions. *Id.* Like defined contribution plans, however, a cash balance plan creates an account for each participant. But unlike traditional defined contribution plans, the account is hypothetical and created only for recordkeeping purposes. *Id.*

The hypothetical account on paper looks much like a traditional 401(k) account. *Id.* at 22. "This account balance is made up of two components: (i) a pay credit (*e.g.*, 3% of pay per year); and (ii) an interest credit on the account balance, which may be fixed or variable and tied to some index." *Id.* If these interest credits are tied to an average rate of return on investments in the stock market, for example, the employer bears any "investment risk" by agreeing to credit the participant's account at that market rate. Even if the employee ceases working for the plan

sponsor, interest credits continue to accrue to the employee's hypothetical account until he or she begins receiving pension benefits. When an employee reaches the normal retirement age of 65, the pension benefit is the value of this hypothetical account balance. The employee can usually choose whether the benefit is distributed in the form of a single-life annuity or a lump-sum disbursement.

In the present case, the AK Steel Plan provides for two different types of cash balance accounts: Opening Accounts and Future Accounts. Opening Accounts represent the lump-sum value of the retirement annuity that an employee had earned under AK Steel's prior benefit formula as of January 1, 1995. The Opening Accounts grow at a minimum interest rate of 7.5% per year. Future Accounts keep track of benefits earned after January 1, 1995, the date on which AK Steel converted its previous traditional pension benefit plan to a cash balance plan. The Future Accounts receive pay credits at a rate of between 3% and 12% per year, calculated according to a chart that factors in both the participant's age and continuous years of service as of December 31, 1994, multiplied by an applicable percentage of pay that is periodically set by AK Steel. For example, a Plan participant who was 39 years old on December 31, 1994 and had six continuous years of service as of that date would receive pay credits at the rate of 3% of earnings. A Plan participant who was 55 years old on that date, in contrast, with the same years of service, would receive pay credits at a rate of 5% of earnings. Interest credits on Future Accounts are tied to the rate of return on U.S. Treasury securities.

The AK Steel Plan provides that

> [s]ubject to the minimum protected benefits described in Section 4.8, a Participant may Retire on or after his Normal Retirement Date and receive a . . . Benefit payable in accordance with Article VI in one of the following payment options: (a) Full lump-sum payable on his Benefit Commencement Date equal to his Accounts; (b) Full annuity beginning on his Benefit Commencement Date equal to the Actuarial Equivalent of his Accounts; or (c) Partial lump-sum and partial annuity payable or beginning on his Benefit Commencement Date equal to the respective pro-rata amounts determined under (a) and (b) above.

AK Steel Plan § 4.1. A participant who takes early retirement, subject to certain conditions not relevant to this appeal, may also elect to receive his or her pension benefit in any of the above-mentioned payment options. AK Steel Plan § 4.2.

Section 4.8 of the AK Steel Plan, titled "Minimum Protected Benefit," states that "no Participant shall have a . . . benefit that is less than the actuarial equivalent of his accrued benefit determined under the terms of the [prior plan]. . . ." "Accrued Benefit" is defined by the Plan as

> the Accounts payable in the form of a single life annuity commencing on a Participant's Normal Retirement Date (or, if later, such Participant's actual retirement date) that is the Actuarial Equivalent of the Participant's current

> Account. The Account is projected to Normal Retirement Date and converted to a single life annuity using the factors set forth in Exhibit I. This single life annuity shall be determined by dividing the then current value of such Participant's Account by the applicable factor as described in Section A of Exhibit I.

Another key provision of the AK Steel Plan is § 1.2, which tracks the language of ERISA. Section 1.2 defines a participant's accrued benefit under a defined benefit plan as an "individual's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A).

The Internal Revenue Service (IRS) issued a determination letter in November of 1996 that approved the AK Steel Plan. As part of its application, the AK Steel Plan expressly stated that an employee electing a lump-sum distribution of benefits would receive a payment equal to his or her account balance.

B. Whipsaw calculation

The most litigated aspect of cash balance plans has proven to be the so-called "whipsaw calculation." This calculation arises when participants opt to "cash out" their hypothetical accounts before they reach normal retirement age. To comply with ERISA, lump-sum payments such as the ones received by the plaintiffs in the present case must be the actuarial equivalent of the normal accrued pension benefit. *See Berger* v. *Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 759 (7th Cir. 2003) (citing 29 U.S.C.

§ 1054(c)(3)). The actuarial equivalent is calculated in two steps. First, a participant's hypothetical account balance is projected forward to normal retirement age -- in the AK Steel Plan, age 65 -- using the rate at which future interest credits would have accrued if the participant had remained in the AK Steel Plan until that time. Second, that projected amount is discounted back to its present value on the date of the actual lump-sum distribution.

If the interest rate used in Step 1 is greater than the discount rate used in Step 2, the amount of the participant's lump-sum disbursement will be larger than his or her hypothetical account balance. This two-step process is commonly referred to as the "whipsaw calculation." In the present case, Opening Accounts receive interest credits at a minimum annual rate of 7.5%, while the statutory discount rate for calculating the present value of a lump-sum distribution has been invariably lower (5.1% in 2002, for example). This causes the value of the pension benefit under the whipsaw calculation to be greater than the simple value of the account balance at the time of the lump-sum distribution. The IRS provides a useful example of the whipsaw effect:

> A cash balance plan provides for interest credits at a fixed rate of 8% per annum that are not conditioned on continued employment, and for annuity conversions using the [Internal Revenue Code §] 417(e) applicable interest rate and mortality table. A fully vested employee with a hypothetical account balance of $45,000 terminates employment at age 45 and elects an immediate single

> sum distribution. At the time of the employee's termination, the Section 417(e) applicable interest rate is 6.5%.
>
> The projected balance of the employee's hypothetical account as of normal retirement age is $209,743. If $209,743 is discounted to age 45 at 6.5% (the Section 417(e) applicable interest rate), the present value equals $59,524.
>
> Accordingly, if the plan paid the hypothetical account balance of $ 45,000, instead of $ 59,524, the employee would receive $ 14,524 less than the amount to which the employee is entitled.

IRS Notice 96-8, 1996-1 C.B. 359.

The plaintiffs argue that ERISA mandates the whipsaw calculation -- in other words, a payout of $59,524 in the example cited above -- and that AK Steel's failure to calculate lump-sum distributions in this manner constitutes a statutory violation of ERISA. AK Steel responds by arguing that, under the plain language of the AK Steel Plan, the plaintiffs received exactly the lump-sum distribution to which they were entitled -- the value of each participant's hypothetical account at the date of termination ($45,000 in the example above).

C. Pension Protection Act of 2006

Cash balance plans are typically designed to pay accrued benefits to participants upon the termination of their employment. *Rachal, Hirschhorn & Eichberger*, 22 Lab. Law. at 27. "ERISA, however, was not designed with cash balance plans in mind and, instead, is premised on the notion that in a de-

fined benefit plan, the benefit due is an annuity beginning at the normal retirement age, typically age sixty-five." *Id.* Until August of 2006, ERISA enforced this annuity obligation through several interrelated provisions. *Id.* at 20, 27. The net result of this enforcement scheme was that a cash balance plan such as the AK Steel Plan would be required to use the whipsaw calculation in order to comply with ERISA. *See id.* at 27.

Partly to address the treatment of cash balance plans under the ERISA statutory scheme, Congress passed the Pension Protection Act (PPA) of 2006. Pub. L. No. 109-280, 120 Stat. 780 (2006). The PPA created special rules for cash balance plans, among them the provision that defined benefit plans shall not be treated as failing to meet the requirements of ERISA solely because the present value of an accrued benefit is deemed equal to the amount expressed as the balance in a participant's hypothetical account. PPA § 701(a)(2). These rules apply to distributions made after August 17, 2006. PPA § 701(e)(2). In effect, the PPA establishes on a prospective basis that the whipsaw calculation is not required.

D. Procedural history

John West was employed by Armco, Inc. from October 1966 until his retirement from the company in August of 1997 at the age of 57. He was a participant in the Armco, Inc. Retirement Accumulation Pension Plan, a part of the Armco, Inc. Noncontributory Pension Plan. Upon taking early retirement, West elected to receive his pension benefits in a lump-sum distribution. He signed a benefit-election form acknowledging that he understood his payment

options, and that he was making a fully informed decision to receive his benefits in the form of a lump-sum distribution equal to his account balance. In September of 1999, Armco, Inc. merged with AK Steel. The original Armco retirement plan, in which West was a participant, became part of the AK Steel Plan.

West submitted an administrative claim to the AK Steel Plan administrators in September of 2000 that challenged the amount of his lump-sum benefit. He argued that the lump-sum benefit he received was not the actuarial equivalent of the benefit that he would have been entitled to at age 65 because it did not account for the interest credits that would have continued to accumulate under the terms of the AK Steel Plan if he had waited until the age of 65 to collect his benefits. The AK Steel Plan Committee rejected his administrative claim as untimely and, with regard to the merits, ruled that West had received all of the benefits due to him under the terms of the AK Steel Plan.

In January of 2002, West filed suit on behalf of himself and all others similarly situated, claiming that this alleged underpayment of benefits violated ERISA. The district court certified the class in March of 2004. A month later, the district court granted West's motion for partial summary judgment on the issue of liability. After denying a subsequent motion by AK Steel to dismiss West's claim as time-barred, the district court awarded damages of over $37 million to the class together with prejudgment interest. AK Steel timely appealed.

II. ANALYSIS

A. Standard of review

We review the district court's grant of summary judgment under the de novo standard. *Tatis* v. *U.S. Bancorp*, 473 F.3d 672, 674 (6th Cir. 2007). That same standard applies to our review of the district court's interpretation of a statute. *United States* v. *Tudeme*, 457 F.3d 577, 580 (6th Cir. 2006). The district court's decision of whether to apply the Plan requirement that ERISA plaintiffs must exhaust their administrative remedies before filing suit in federal court is reviewed under the abuse-of-discretion standard. *Costantino* v. *TRW*, Inc., 13 F.3d 969, 974 (6th Cir. 1994).

B. Jurisdiction under ERISA to grant the relief requested

Section 502(a)(1)(B) of ERISA authorizes a participant or beneficiary of a benefit plan to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." ERISA § 502(a)(3), on the other hand, authorizes a participant, beneficiary, or fiduciary of a benefit plan to bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations, or (ii) to enforce any provisions of this subchapter or the terms of the plan."

West's complaint tracks the language of both § 502(a)(1)(B) and § 502(a)(3):

> This is a class action to enforce, and to redress violations of [ERISA]. The action is brought on behalf of participants in an ERISA-qualified pension plan to recover benefits due them under the terms of the plan, to enforce their rights under the terms of the plan, to clarify their rights to future benefits under the terms of the plan, and to redress violations of ERISA.

The prayer for relief requests damages to remedy the alleged underpayment of benefits due to how the lump-sum distribution was calculated under the AK Steel Plan. AK Steel argues that neither prong of the ERISA enforcement scheme authorizes the relief that the plaintiffs seek. We will analyze the two statutory provisions in reverse order.

1. Equitable relief under § 502(a)(3)

AK Steel argues, and we agree, that the plaintiffs cannot recover the relief they request under ERISA § 502(a)(3). Any doubt on this point was eliminated by this court's decision in *Crosby* v. *Bowater, Inc. Ret. Plan*, 382 F.3d 587 (6th Cir. 2004). The plaintiff in *Crosby*, a retirement plan participant, argued that the plan administrator's use of a preretirement mortality discount factor in the whipsaw calculation of lump-sum preretirement benefits constituted a statutory violation of ERISA. *Id.* at 589. As a result, Crosby alleged that he and similarly situated plan participants were paid a benefit that fell short of the amount that they were legally entitled to receive. *Id.* "At the heart of the plaintiff's prayer for relief was a request for recovery of additional lump sum benefits." *Id.* The complaint requested "equita-

ble and injunctive relief." *Id.* Unlike in the present case, however, *Crosby* specifically argued that he was precluded from bringing a claim under § 502(a)(1)(B). *Id.* at 591 n.5. The court "intimate[d] no view as to whether [that] proposition is correct." *Id.*

Crosby argued that the relief he requested was an appropriate equitable remedy because he did not seek to impose liability for a contractual monetary obligation. *Id.* at 592-93. This court, in rejecting his argument, began its analysis by noting that the Supreme Court has held that equitable relief refers to the categories of relief traditionally available in a court of equity-namely, injunction, mandamus, and restitution, but not compensatory damages. *Id.* at 594. Lawsuits seeking to compel the defendant to pay a sum of money, on the other hand, almost invariably are suits for money damages, the classic form of legal relief. *Id.* at 594. The court therefore held that ERISA § 502(a)(3) "does not, in most situations, authorize an action for money claimed to be due and owing." *Id.* at 589.

Unlike *Crosby*, the plaintiffs in the present case expressly brought their claims under both § 502(a)(3) and § 502(a)(1)(B). The prayer for relief, however, centers on money damages for the alleged underpayment of a benefit. Although the plaintiffs also request unspecified "other relief as may be deemed just and equitable," that phrase is found in the portion of the complaint requesting costs and attorney fees. This is insufficient to assert a proper equitable claim under § 502(a)(3) where the "heart of the plaintiff's prayer for relief was a request for recovery of additional lump sum benefits." *Crosby*, 382 F.3d at 589.

The plaintiffs in the present case have already "cashed out" of their participation in the Plan, so traditional forms of equitable relief -- injunction, mandamus, or restitution -- would not redress their claim. Because the plaintiffs' claim in the present case is essentially one for money damages, we conclude that Crosby forecloses their claim to the extent that they rely on § 502(a)(3). *See id.* at 589 ("For the district court to order the defendants "to refund" (*i.e.* to pay) the difference between the amount calculated without a mortality discount and the amount actually received was to grant a form of relief not typically available in equity."); *see also Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 210, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002) ("[S]uits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for money damages, as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.") (citation and quotation marks omitted).

2. Damages under § 502(a)(1)(B)

West received his lump-sum payment in August of 1997. At that time, he executed a benefit-election form acknowledging that he understood his options and that he was making a fully informed choice of a lump-sum payment equal to his hypothetical account balance. He did not submit an administrative claim disputing the amount of the lump-sum payment until September of 2000. That claim was dismissed as untimely. Section 2.15(f) of the AK Steel Plan states that any claim questioning the amount of the benefit will be rejected unless it is

filed within 90 days from the date of the first payment, subject to a showing of extenuating circumstances for the failure to timely file. Moreover, that section specifies that a "claimant who does not submit a written claim or request for review within the time limitations specified above shall be deemed to have waived and abandoned any such claim or right of review except with the express written approval of and in the discretion of the Committee."

AK Steel moved for the entry of judgment on West's claim, arguing that the claim had been untimely filed. The motion was not based on the theory that the statute of limitations on West's right to bring suit had expired, but rather that he had failed to seek timely administrative review as specified by the Plan. Concluding that West had not waived his legal claim under ERISA and that he was not required to first exhaust his administrative remedies, the district court denied the motion. The court concluded that resort to the administrative process would have been futile because the AK Steel Committee would have simply recalculated the benefits under the method outlined in the AK Steel Plan, resulting in the same benefit amount. It found that West's futility argument is based on his position that the provisions of the AK Steel Plan violate ERISA and the Internal Revenue Code and that no amount of administrative review would alter the calculation of benefits under the current terms of the plan.

On appeal, AK Steel argues that West cannot proceed under § 502(a)(1)(B) because he has already received all of the benefits he was due under the terms of the plan. It contends that he is now barred from bringing his damage claim for a statutory viola-

tion of ERISA because West had to "concede" that he received all of the benefits due him under the terms of the Plan in order to successfully argue that he came within the futility exception to ERISA's exhaustion requirement.

We respectfully disagree. To rule in favor of AK Steel on this ground would present future plaintiffs who would otherwise qualify for the futility exception to the exhaustion requirement with an untenable dilemma -- having to concede their claim on the merits in order to survive a motion to dismiss for failure to exhaust administrative remedies. AK Steel, in our view, oversimplifies West's argument in an attempt to strip him of any remedy for the alleged violation of ERISA. As the district court aptly stated:

> Here, Plaintiffs contend that they are entitled to additional lump sum benefits under the terms of the Plan, because the Plan's treatment of lump sum payments violates ERISA. To accept Defendant's argument that Plaintiffs cannot bring any claim, would in effect permit plan terms that blatantly violate ERISA to stand unchallenged, because once the benefits were paid, participants could not bring a claim under § 502(a)(1)(B) for benefits "under the terms of the plan."

Exhaustion here would have been futile because, under the AK Steel Plan, a lump-sum distribution is described as a payment equal to the participant's account balance. Had West submitted a timely claim for the recalculation of his lump-sum benefit, the AK Steel Committee would simply have

responded, as it has argued in this appeal, that West has already received an amount equal to his account balances, which is all that he is entitled to under AK Steel's interpretation of its Plan. The district court thus did not abuse its discretion in concluding that the exhaustion requirement does not apply in this case. *See Fallick* v. *Nationwide Mut. Ins. Co.*, 162 F.3d 410, 420 (6th Cir. 1998) ("[W]hen resort to the administrative review process would be an exercise in futility, the exhaustion of remedies doctrine shall not apply.").

Although AK Steel has a point that § 502(a)(1)(B) offers redress only for the recovery of benefits, enforcement of rights, or clarification of rights to future benefits under the terms of the Plan, those terms must nevertheless comply with ERISA. As will be discussed in greater detail below, the key issue is whether West was paid less than the full accrued benefit due him under the AK Steel Plan because of his election to receive that accrued benefit as a lump sum rather than as a traditional annuity. AK Steel concedes that the accrued benefit cannot be forfeited due to the form of distribution without violating ERISA.

Our conclusion that ERISA § 502(a)(1)(B) provides an appropriate remedy is bolstered by other cases in which plaintiffs have been allowed to proceed on similar claims. *See Esden* v. *Bank of Boston*, 229 F.3d 154, 161-62 (2d Cir. 2000) (allowing a class action under ERISA § 502(a)(1)(B) for unpaid benefits in a cash balance plan where the plan specified that lump-sum payments were equal to the amount in the participant's hypothetical account); *Laurent* v. *PriceWaterhouseCoopers LLP*, 448 F. Supp. 2d 537,

540 (S.D.N.Y. 2006) (denying the plan sponsor's motion to dismiss the plaintiffs' claim that the cash balance plan's provision for calculating lump-sum benefits violated ERISA because the balance payable under the terms of the plan was an amount less than the actuarial value of the accrued benefits); *see also Met. Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987) (describing ERISA § 502(a)(1)(B) as the "exclusive federal cause of action" for recovering benefits from a covered plan).

C. Whipsaw calculation and ERISA compliance

AK Steel argues that neither ERISA nor the Internal Revenue Code (IRC) require the whipsaw calculation adopted by the district court. The district court held that, in order to calculate a participant's lump-sum payment, the participant's hypothetical account balance must be (1) projected forward at AK Steel Plan's specified interest rates into a life annuity beginning at age 65, and then (2) discounted back at the lower statutory rates (prescribed by ERISA and the IRC) to a lump-sum present value. AK Steel argues that it is entitled to use the same statutory rate for both steps of the calculation. If so, the calculation would be a wash and the lump-sum payout would always equal the participant's hypothetical account balance at the time of distribution.

1. Prior caselaw dealing with the whipsaw calculation and cash balance plans

Three other circuits have addressed the issue of whether the whipsaw calculation is required for a lump-sum payout from a cash balance plan where a participant can retire prior to normal retirement age. These three cases are as follows:

a. *Lyons* v. *Georgia-Pacific Corp. Salaried Employees Retirement Plan*

In *Lyons* v. *Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235 (11th Cir. 2000), a plan participant could elect to receive his or her "accrued pension benefits in an optional lump sum form, payable immediately, rather than as an annuity commencing at age 65." *Id.* at 1238. "If the participant elects this option, the amount payable under the Plan is a single sum equal to the amount in the participant's Personal Account (the hypothetical bookkeeping account)." *Id.* at 1238-39. Just like West in the present case, Lyons sued for the underpayment of benefits, alleging that the amount Georgia-Pacific distributed to him was substantially less than what he was entitled to receive under ERISA § 203(e), as interpreted by Treas. Reg. 1.411(a)-11 (which "restricts the ability of defined benefit plans to distribute any portion of a participant's accrued benefit in optional forms of benefit without complying with specific valuation rules for determining the amount of the distribution") and Treas. Reg. 1.417(e)-1 (which requires a minimum lump sum payable from a defined benefit plan to be at least equal to the present value of the participant's normal retirement benefit). *Id.* at 1239. The annual amount of interest added to Lyon's hypothetical account as specified in the Georgia-Pacific Plan (used in Step 1 of the whipsaw calculation) was higher than the maximum discount rate (used in Step 2 of the whipsaw calculation to determine the present value of the projected age-65 annuity) prescribed by ERISA § 203(e). *Id.* at 1241.

Agreeing with Lyons, the Eleventh Circuit held that he should benefit from the whipsaw calculation. The Lyons court succinctly stated the issue: "If the plan had pegged the interest credit rate to the prescribed maximum discount rate, there would have been no difference (regardless of the time factor), and no dispute. But it did not, so there is a dispute." *Id.* at 1241.

Treas. Reg. 1.411(a)-11, which sets forth the same discount restrictions on calculating the present value of lump-sum distributions as ERISA § 203(e), specifies "that the present value of any optional form of benefit (a lump sum payout is an optional form of benefit), cannot be less than the present value of the participant's normal retirement benefit." *Id.* at 1244. The Lyons court held that, "[u]nlike a defined contribution plan, the accrued benefit under this Plan is not the amount in the Participant's Personal Account, but rather an amount derived from that hypothetical account." *Id.* at 1251 (emphasis in original). In contrast to the AK Steel Plan, the Georgia-Pacific Plan itself required the whipsaw calculation:

> To determine the normal retirement amount Lyons would have received at age 65, the Plan specifies that his hypothetical account balance must be projected forward using the interest credit rates set forth in the Plan. It is the Plan itself, rather than the Treasury regulations, that require the hypothetical account balance to be projected forward using the credit interest rate, and it is the Plan itself that specifies the interest credit rate to be applied for that pur-

> pose. What the Treasury regulation adds is that once the normal retirement benefit is ascertained in accordance with the Plan, that amount is then to be discounted to present value using the [Pension Benefit Guaranty Corporation (PBGC)] rate [prescribed by ERISA § 203] in order to calculate the lump sum distribution to which the participant is entitled.
>
> * * *
>
> Distribution of the hypothetical account balance alone is not enough where, as here, the interest credit rate exceeds the [PBGC] rate.

Id. at 1252.

b. *Esden* v. *Bank of Boston*

The Bank of Boston amended its plan in 1989 to become a cash balance plan. *Esden* v. *Bank of Boston*, 229 F.3d 154, 159 (2d Cir. 2000). Like the present case, the Bank of Boston Plan provided that whenever a participant elected a lump-sum distribution, the benefit received would be equal to the balance of the participant's hypothetical account. *Id.* at 161. Esden elected to take a lump-sum benefit at the time she terminated her employment in the amount of $1,533.98. *Id.* at 160. This was the balance in her hypothetical account at that time. *Id.* Had Esden waited until the age of 65 to cash out her plan, she would have been entitled under the terms of the Plan to a minimum accrued benefit of $7,086.83 -- the projected lump-sum amount of her account at age 65, assuming a minimum guaranteed interest credit of

5.5%. *Id.* at 160-61. At the time of her termination, that projected age-65 annuity benefit had a present value of $1,595.52 (slightly more than what she received). *Id.* at 161. Esden argued that she received less than what the law requires under ERISA. *Id.* at 162.

The Bank of Boston contended, as does AK Steel in the present case, that Esden received all that she was promised under the explicit terms of the plan, and that any additional payout would constitute a windfall at the expense of the other Plan participants. *Id.* Agreeing with Esden, the Second Circuit concluded that the "Plan does not comply with the statutory and regulatory requirements, or with their authoritative interpretation issued by the IRS." *Id.* at 162. Moreover, it concluded, "the IRS's interpretation of how the existing regulations apply to cash balance plans is reasonable and consistent." *Id.* The court summarized the relevant ERISA and IRC requirements for pension distribution in less-technical language:

> What these provisions mean . . . is that: (1) the accrued benefit under a defined benefit plan must be valued in terms of the annuity that it will yield at normal retirement age; and (2) if the benefit is paid at any other time (*e.g.*, on termination rather than retirement) or in any other form (*e.g.*, a lump sum distribution, instead of annuity) it must be worth at least as much as that annuity.
>
> This rule that regardless of any option as to timing or form of distribution, a vested participant in a defined benefit

> plan must receive a benefit that is the actuarial equivalent of her normal retirement benefit (that is, the accrued benefit expressed as an annuity beginning at normal retirement age) has been repeatedly recognized by courts.

Id. at 163 (emphasis added) (citations omitted).

The court in *Esden* concluded that the Bank of Boston could not use the same rate in both Step 1 and Step 2 of the whipsaw calculation without working an impermissible forfeiture in violation of ERISA. *Id.* at 165-66 ("Either the plan must have employed a discount rate equal to the interest credit rate, and by hypothesis in excess of the prescribed 'applicable rate,' in violation of Code section 417(e) and ERISA section 205(g); or the plan must have projected the cash account balance forward at a rate less than the interest credits provided under the plan, thereby working a forfeiture under Code section 411(a)(2) and ERISA § 203(a)(2).") (relying on IRS Notice 96-8). The fact that Esden received exactly what she was promised under the terms of the plan was deemed irrelevant because the "issue is whether the Plan's terms complied with the law." *Id.* at 172. As the court observed, "[t]he Plan cannot contract around the statute." *Id.* at 173.

c. *Berger* v. *Xerox Corp. Retirement Income Guarantee Plan*

In 2003, the Seventh Circuit affirmed a $300 million class action judgment against Xerox for underpayments made to participants in its cash balance pension plan who elected to take a lump-sum payout upon termination of employment. *Berger* v. *Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755,

757-58 (7th Cir. 2003). Xerox's plan entitled the "departing employee not to the balance in his (hypothetical) account, but to the balance when he receives the 'distribution' of his pension benefit." *Id.* at 758-59. The Xerox Plan computed lump-sum distributions paid out before normal retirement age under the whipsaw calculation, but because it used identical interest rates in both steps of the calculation, the result always equaled the participant's cash balance on the date of his or her departure. *Id.* at 760.

What Xerox did is exactly what AK Steel argues is the proper approach in the present case. But just as in *Lyons*, *Esden*, and the present case, the interest credit rate specified in the Xerox Plan was higher than the statutory discount rate. *See id.* The whipsaw-calculation issue was thus squarely before the *Berger* court.

ERISA, said the court, mandates that any lump-sum substitute for an accrued pension benefit must be the actuarial equivalent of that benefit. *Id.* at 759 (citing 29 U.S.C. § 1054(c)(3)). The Seventh Circuit held that future interest credits are part of a participant's accrued benefit. *Id.* A participant in the Xerox Plan had an "absolute, vested, indefeasible entitlement . . . to a pension at age 65 based on his cash balance as increased by future interest credits accruing between his departure and his reaching that age, provided only and obviously that he does not demand an earlier distribution." *Id.* Because that pension entitlement is an accrued benefit under the plan, any lump-sum distribution occurring before the participant reaches the age of 65 "has to include a fair estimate of those [interest] credits." *Id.* Xerox was, in short, inviting participants "to sell their pension en-

titlement back to the company cheap, and that is a sale that ERISA prohibits." *Id.* at 762.

2. Value of accrued benefit in the AK Steel Plan

AK Steel argues that it is allowed under ERISA to use the same statutory rate at both steps of the whipsaw calculation because the Plan does not provide an accrued benefit "in the form of an annual benefit commencing at normal retirement age" as specified in Treas. Reg. § 1.411(a)-7(a)(1)(i). It argues that because West received a lump-sum distribution, his accrued benefit was provided in a different form and is therefore governed by subsection (ii) of that regulation. Under that subsection, the accrued benefit is "an annual benefit commencing at normal retirement age which is the actuarial equivalent" of the accrued benefit determined under the plan. Treas. Reg. § 1.411(a)-7(a)(1)(ii). If AK Steel can fit its definition of accrued benefit within that subsection, so the argument goes, then it can use the same actuarial equivalence factors under IRC § 411(c)(3) both to project forward the age-65 annuity and to discount the annuity to present value. The result would always equal the participant's account balance at the time of the lump-sum payout.

We respectfully disagree. The AK Steel Plan expressly states in § 1.2 that the

> "Accrued Benefit" is the "Accounts payable in the form of a single life annuity commencing on a Participant's Normal Retirement Date (or, if later, such Participant's actual retirement date) that is the Actuarial Equivalent of the Participant's current Account.

A benefit paid at any other time or in another form "must be worth at least as much as that annuity. *Esden*, 229 F.3d at 163. AK Steel equates the lump-sum payment option it offers to participants as an accrued benefit "to be determined as an amount other than an annual benefit commencing at normal retirement age," which under its theory would entitle it to make the whipsaw calculation a complete wash. *See* IRC § 411(c)(3).

The definition of what constitutes an accrued benefit under the terms of the Plan, however, is clear -- the annual benefit commencing at normal retirement age. AK Steel Plan § 1.2. To the extent that the Plan's language with respect to lump-sum distributions is ambiguous in that it conflicts with the definition of "accrued benefit" in another section of the Plan, the ambiguity must be resolved in the plaintiffs' favor. *See Regents of Univ. of Mich.* v. *Employees of Agency Rent-A-Car Hosp. Ass'n*, 122 F.3d 336, 340 (6th Cir. 1997) ("[A]ny ambiguities in the language of the [ERISA] plan [are to] be construed strictly against the drafter of the plan.").

We believe that the facts of the present case on this particular point are indistinguishable from *Esden* and *Berger*. Had West elected not to cash out of the AK Steel Plan by taking the lump-sum distribution prior to reaching the age of 65, he would have continued to receive interest credits on his Opening and Future Accounts under the Plan. Those interest credits were not taken into account by the Plan when disbursing a lump-sum payout "equal to his Accounts" before West reached the age of 65. AK Steel Plan § 4.1. The Plan's terms thus did not comply with the law. *See Esden*, 229 F.3d at 172. What hap-

pened here is exactly what happened in *Berger* -- West was required to "sell" his pension entitlement back to AK Steel at a discount in order to receive his lump-sum payout. *See Berger*, 338 F.3d at 762. AK Steel's requirement thus violates ERISA.

"Any distribution in optional form (such as a lump sum) must be no less than the actuarial equivalent of [the normal retirement] benefit." *Esden*, 229 F.3d at 159. And as discussed above, the normal retirement benefit is "a single-life annuity payable at normal retirement age." *Id.*; *see also* AK Steel Plan § 1.2. AK Steel's complicated interpretations of the relevant statutes and regulations do not, in our view, refute these basic legal principles.

But AK Steel argues that affirming the district court's requirement that the Plan base early lump-sum payouts on the whipsaw calculation will lead to unintended and catastrophic results. It also claims that affirming the district court's ruling somehow amounts to age discrimination. We find neither of these arguments to be persuasive. First of all, the whipsaw calculation may have an unintended effect on this particular Plan, but that is not the issue here. As the *Esden* court noted: "[i]t is undisputed that the governing statutes and regulations were developed with traditional final-pay defined benefit plans in mind; they do not always fit in a clear fashion with cash balance plans and they sometimes require outcomes that are in tension with the objectives of those plans." *Esden*, 229 F.3d at 159. The Plan is nonetheless required to comply with ERISA. As explained above, we conclude that it did not do so in this case. Second, what may appear at first blush to be age discrimination is really nothing

more than the time value of money. *See Cooper* v. *IBM Personal Pension Plan*, 457 F.3d 636, 639 (7th Cir. 2006) ("Treating the time value of money as a form of discrimination is not sensible.").

AK Steel attempts to undercut the persuasive force of *Esden* and *Berger* "because both decisions upheld whipsaw claims on the basis of deference to [Treasury] Notice 96-8." It argues that both the Second Circuit and the Seventh Circuit unknowingly deferred to a Notice that the IRS is "fundamentally reconsidering." This argument misconstrues, in our view, the nature of those holdings. AK Steel is correct in that both decisions discussed Notice 96-8 in some detail and cited it as support for their conclusions that the whipsaw calculation was required. *See Esden*, 229 F.3d at 169 (holding that the Notice is "entitled to deference, regardless of its form of publication"); *Berger*, 338 F.3d at 762 (describing Notice 96-8 as "authoritative").

But the court in *Esden* specifically stated that "even if we were to disregard Notice 96-8, we would reach the same result, as explained above, on the basis of the governing statutes and regulations." 229 F.3d at 172; *accord Berger*, 338 F.3d at 763 ("We conclude, in agreement with the Second Circuit which considered a materially identical plan in the Esden case, that the Xerox plan's method of computing the plaintiffs' lump-sum entitlements violates ERISA.").

In sum, we agree with the analysis of our sister circuits and with that of the district court below. Each plaintiff is entitled to have his or her lump-sum distribution reevaluated using the whipsaw calculation as determined by the district court, plus interest.

D. Preretirement mortality discount

AK Steel next argues that even if a whipsaw calculation is required under ERISA, the district court erred in holding that the Plan may not use a preretirement mortality discount in performing that calculation. The mortality discount, according to the district court, "factors into the present value of a future benefit the possibility that a participant might die before receiving that benefit, and thus receive nothing." Relying on *Berger* v. *Xerox*, 231 F. Supp. 2d 804 (N.D. Ill. 2002) (Berger I), and *Crosby* v. *Bowater Inc. Retirement Plan for Salaried Emples. of Great Northern Paper, Inc.*, 212 F.R.D. 350 (W.D. Mich. 2002), vacated and remanded on other grounds, *Crosby* v. *Bowater*, 382 F.3d 587 (6th Cir. 2004), the district court concluded that a preretirement mortality discount "should not be applied to the present value calculation because it would reduce a participant's 'accrued benefit' of the interest credit rate projection."

The issue, according to the district court, is whether ERISA's actuarial-equivalence rules forbid the use of a mortality discount. It reasoned that the central premise underlying the whipsaw calculation is "that a participant's benefit should not be reduced by electing to receive a lump sum instead of waiting to receive an annuity." Because the AK Steel Plan did not contemplate using the whipsaw calculation at all, the Plan does not address whether a mortality discount applies.

If a Plan participant dies before reaching the age of 65, the Plan's terms provide that the surviving spouse or other beneficiary receives a death benefit "equal to the participant's pension benefit." Section

5.1 of the AK Steel Plan defines the death benefit for an unmarried participant as the greater of (1) a lump sum equal to the participant's account at the time of death, or (2) the actuarial equivalent of the participant's minimum protected benefit as defined by § 4.8. The minimum protected benefit under § 4.8 is the actuarial equivalent of the participant's accrued benefit. And, as stated above, the accrued benefit is defined as the "Accounts payable in the form of a single life annuity commencing on a Participant's Normal Retirement Date . . . that is the Actuarial Equivalent of the Participant's current Account." AK Steel Plan § 1.2. Because the beneficiary receives a death benefit equal to the participant's accrued benefit, he or she "steps into [the participant's] shoes and is entitled to his entire pension benefit." *See Berger II*, 338 F.3d at 764 (rejecting the Plan's argument that a preretirement mortality discount properly applied to the calculation of damages in whipsaw claims materially indistinguishable from the present case).

AK Steel argues, however, that *Berger I* and *Crosby* were both incorrectly decided, so that any reliance by the district court on those cases is misplaced. We respectfully disagree, and find that the reasons given by the *Berger I* court (and relied upon by the district court) for rejecting the use of a preretirement mortality discount to be well-supported. Even if the participant were to die before the age of 65, his or her beneficiary is still entitled to the entire accrued benefit. AK Steel Plan § 1.2. "Use of a mortality discount for the period before age sixty-five would, accordingly, result in a partial forfeiture of benefits in violation of the ERISA vesting rules (*i.e.*,

the anti-forfeiture rules)." *Berger I*, 231 F. Supp. 2d at 804. Using a mortality discount to reduce the present value of the lump-sum distribution in the present case would also have the effect of reducing the value of the interest credits, as the district court pointed out. This would create the same impermissible forfeiture under ERISA as described in Part II.C. above.

E. Pension Protection Act of 2006

AK Steel's final challenge to the district court's decision relates to the PPA, which the President signed into law on August 17, 2006. This law resolves the whipsaw controversy for the future by amending ERISA and the IRC to explicitly state that cash balance plans are not required to employ the whipsaw calculation when figuring lump-sum distributions. Section 701(a)(2) amends ERISA § 203 by adding special rules for defined benefit plans. One such rule is that these plans "shall not be treated as failing to meet . . . the requirements of [ERISA § 203(a)(2)], or . . . the requirements of section 204(c) or section 205(g) . . . solely because the present value of the accrued benefit (or any portion thereof) of any participant is, under the terms of the plan, equal to the amount expressed as the balance in the hypothetical account." PPA § 701(a)(2). Section 701(b)(2) similarly amends the IRC.

The PPA specifies that these amendments "shall apply to periods beginning on or after June 29, 2005," PPA § 701(e)(1), and that they "shall apply to distributions made after the date of the enactment of this Act," which was August 17, 2006. PPA § 701(e)(2). AK Steel argues that any monetary relief paid to West and the other class plaintiffs would be a

"distribution" made after August 17, 2006, and therefore not required by the PPA.

We find this argument to be without merit. As West points out, the class is limited to vested participants in the AK Steel Plan "who retired or were terminated from employment on or after January 1, 1995 and who received their pension benefits under the Plan in the lump sum form of payment on or before April 1, 2005." Internal Revenue Service Notice 2007-6, which provides transitional guidance regarding the application of the PPA to cash balance plans, states that the amendments at issue here "are generally effective for periods beginning on or after June 29, 2005." Notice 2007-6, 2007-3 I.R.B. 272 (Jan. 16, 2007). Moreover, Section 701(d)(2) of the PPA provides that "[n]othing in the amendments made by this section shall be construed to create an inference with respect to . . . the determination of whether an applicable defined benefit plan fails to meet the requirements of sections 203(a)(2), 204(c), or 205(g) of [ERISA or the Code] solely because the present value of the accrued benefit (or any portion thereof) of any participant is, under the terms of the plan, equal to the amount expressed as the balance in a hypothetical account."

Questioning the correctness of the whipsaw calculation to the case before us based upon the enactment of the PPA would thus be improper. *Cf. O'Gilvie* v. *United States*, 519 U.S. 79, 90, 117 S. Ct. 452, 136 L. Ed. 2d 454 (1996) (holding that a section of the Small Business Job Protection Act of 1996 did not apply "[b]ecause it is of prospective application," and because "[t]he Conference Report on the new law says that 'no inference is intended' as to the proper

interpretation of § 104(a)(2) prior to amendment") (citation and brackets omitted). The legislative history of the PPA also supports this conclusion. *See* 152 Cong. Rec. at S8762 (daily ed. Aug. 3, 2006) (quoting Senator Max Baucus, the ranking member of the PPA's reporting committee, as saying "We have dealt with the law going forward. We intend no inference to what the rules were prior to enactment. We will leave the past to the courts.") (emphasis added).

What is at stake here is a damages claim for AK Steel's past miscalculation of benefits. The monetary relief awarded by the district court is not a new "distribution" under a retirement plan as contemplated by the PPA, but retrospective relief for a past violation of the law as it stood at the time of the distribution. *See, e.g.*, *Lieske* v. *Morlock*, 570 F. Supp. 1426, 1430 (N.D. Ill. 1983) (denying the plan administrator's motion to dismiss the beneficiaries' ERISA claim as moot where the complaint "[did] not seek distribution of lump sum payouts but rather damages incurred by the plaintiffs as a result of defendants wrongfully denying the lump sum distributions").

Characterizing the damages award in the present case as a distribution subject to the parameters of the PPA would make the PPA effectively retroactive despite specific language in the statute to the contrary. We decline to do so here. Because of our conclusion that the PPA is not retroactive in application, it has no effect on the legal analysis of the present case.

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN D. WEST, on behalf of himself
and all others similarly situated,

Plaintiff-Appellee,

v.

AK STEEL CORPORATION (formerly Armco Inc.)
RETIREMENT ACCUMULATION PENSION PLAN
and AK STEEL CORPORATION BENEFIT PLANS
ADMINISTRATIVE COMMITTEE,

Defendants-Appellants.

No. 06-3442

August 8, 2007, Filed

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in

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* Judge Daughtrey recused herself from participation in this ruling.

the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

JOHN D. WEST, on Behalf of Himself and All Other Persons Similarly Situated,
Plaintiff,

vs.

AK STEEL CORPORATION RETIREMENT ACCUMULATION PENSION PLAN, et al.,
Defendant.

Case 1:02-cv-0001

April 8, 2004, Decided

ORDER

This matter is before the Court on Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 37) and Defendants' Motion for Summary Judgment (Doc. No. 39). Plaintiffs' filed a joint memorandum in opposition to Defendants' motion and a reply in support of their own motion (Doc. No. 42) to which Defendants filed a reply (Doc. No. 44). The parties filed a number of supplemental filings of recent authority relating to the issues raised in this case. (Doc. No. 45, 47, and 48).

I. BACKGROUND

This class action[1] was brought by former participants of the AK Steel Corporation Retirement Ac-

[1] The Court certified the class on March 9, 2004. (Doc. No. 55).

cumulation Pension Plan ("the AK Steel Plan")[2] against the AK Steel Plan and the AK Steel Corporation Benefit Plan Administrative Committee ("the AK Steel Committee") for violations of the Employee Retirement Income Act of 1974 ("ERISA") and the Internal Revenue Code ("I.R.C.") (Doc. No. 1, P 31).

The AK Steel Plan is a cash balance plan, a hybrid of a traditional defined benefits plan and a traditional defined contribution plan.[3] Under a cash balance plan, an employee has a hypothetical account balance which periodically increases by a specified percentage of the employee's salary ("a compensation credit") plus an interest credit. When an employee reaches the normal age of retirement (usually age 65), his or her pension benefit is the value of the hypothetical account balance in the form of a single life annuity and/or a lump sum disbursement.

The issue in this case is the manner in which a participant's benefit is calculated in the event his or her participation in the AK Steel Plan is terminated

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[2] The AK Steel Plan is a component of a larger plan, the AK Steel Corporation Noncontributory Pension Plan, which resulted from the merger of Armco with AK Steel Corporation and the merger of their respective pension plans in 1999.

[3] Under a traditional defined contribution plan, an employee's pension benefit is the value of his or her retirement account to which contributions have been made by the employer and/or employee. Under a defined benefit plan, an employee's pension benefit is an amount, either in the form of an annuity or lump sum, equal to a specified percentage of the employee's salary in the final years of his employment.

prior to reaching normal retirement age.[4] Under the AK Steel Plan, such a participant may elect to receive his or her pension benefit in the form of an immediate lump sum disbursement. The amount of the lump sum disbursement is equal to the amount of a participant's hypothetical account balance.

Plaintiffs have brought the current action alleging that the manner in which their lump sum disbursements were calculated under the AK Steel Plan violated ERISA and the I.R.C. Plaintiffs are seeking partial summary judgment on the issue of liability and Defendants are seeking summary judgment on all of Plaintiffs' claims.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party opposing a properly supported summary judgment motion "'may not rest upon the mere alle-

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[4] Armco converted its traditional defined benefit plan into a cash balance plan on January 1, 1995. Employees affected by the conversion received two types of hypothetical accounts - a Future Account and an Opening Account. The Future Account was for service after January 1, 1995 and was credited with both compensation and interest credits. The Opening Account included benefits earned prior to January 1, 1995. An employee's Opening Account balance was determined by converting an employee's pre-1995 life annuity benefit into an account balance by calculating the present value of the employee's life annuity using a 7.5% discount rate. After the initial conversion, only interest credits were added to the Opening Account.

gations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (quoting *First Nat'l Bank of Arizona* v. *Cities Serv. Co.*, 391 U.S. 253, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)). The Court is not duty bound to search the entire record in an effort to establish a lack of material facts. *Guarino* v. *Brookfield Township Trs.*, 980 F.2d 399, 404 (6th Cir. 1992); *InterRoyal Corp.* v. *Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), cert. denied, *Superior Roll Forming Co.* v. *InterRoyal Corp.*, 494 U.S. 1091, 108 L. Ed. 2d 967, 110 S. Ct. 1839 (1990). Rather, the burden is on the non-moving party to "present affirmative evidence to defeat a properly supported motion for summary judgment ...," *Street* v. *J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989), and to designate specific facts in dispute. *Anderson*, 477 U.S. at 250. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industries Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The court construes the evidence presented in the light most favorable to the non-movant and draws all justifiable inferences in the non-movant's favor. *United States* v. *Diebold Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962).

III. DISCUSSION

ERISA classifies retirement plans as either defined contribution plans or defined benefit plans. *See* ERISA §§ 3(34), (35), 29 U.S.C. §§ 1002 (34),(35). If a plan does not meet the definition of a defined

contribution plan, it is considered a defined benefit plan by default. ERISA § 3(35). Cash balance plans fall into this category. As such, the terms and administration of a cash balance plan must comply with the same ERISA requirements as those for a traditional defined benefit plan.

The issue before the Court is whether the lump sum disbursements received by Plaintiffs complied with ERISA's requirements relating to the early payment of pension benefits.[5] Generally, a pension benefit under a traditional defined benefit plan is in the form of an annual benefit beginning when a participant reaches retirement age. Consequently, ERISA defines a participant's accrued benefit under a defined benefit plan as an "individual's accrued benefit determined under the plan ... expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A).

While ERISA defines an accrued benefit in the form of an annual benefit, it does not actually mandate that pension benefits be paid in such a form. Thus, plans are permitted to disburse benefits in other forms, such as a lump sum disbursement. To protect a participant who receives his or her benefit in the form of a non-annuity, ERISA requires that when a pension benefit takes some other form than an annual benefit, the alternative form must "be the actuarial equivalent" of an annuity commencing at

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[5] Plaintiffs have brought identical claims under both ERISA and the I.R.C. For the sake of simplicity the Court will analyze Plaintiffs' claims under ERISA.

normal retirement age. *See* ERISA § 204(c)(3), 29 U.S.C. 1054(c)(3). *See also*, *Berger* v. *Xerox*, 338 F.3d 755, 759 (7th Cir. 2003) ("ERISA requires that any lump sum substitute for an accrued pension benefit be the actuarial equivalent of that benefit."); *Esden* v. *Bank of Boston*, 229 F.3d 154, 163 (2nd Cir. 2000), cert. dismissed, 531 U.S. 1061, 148 L. Ed. 2d 652, 121 S. Ct. 674 (2001). Consequently, a lump sum disbursement, like the ones received by Plaintiffs under the AK Steel Plan, must be the actuarial equivalent of the annual benefit the participants would have received at normal retirement age.[6]

In the case of a cash balance plan, the actuarial equivalent is calculated by projecting a participant's hypothetical account balance to normal retirement age using the rate at which future interest credits would have been calculated if the participant had remained in the plan until retirement age and then discounting it back to its present value. *See Xerox*, 338 F.3d at 760; *Esden*, 229 F.3d at 159. If the rate at which a participant's hypothetical account balance is projected forward is the same as the rate at which it is discounted back, the amount of the participant's lump sum disbursement will be equal to the amount of his or her hypothetical account balance. However, if the projection rate is higher than the discount rate, the amount of the participant's lump sum disbursement will be larger than his or her hypothetical account balance. Such a situation exists if a cash balance plan's rate for calculating future interest credits is higher than the discount rate

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[6] Normal retirement age under the AK Steel Plan is 65.

established by ERISA. This is commonly referred to as a "whipsaw" calculation. *See Esden*, 229 F.3d at 159, fn. 7.

Administrators of cash balance plans are naturally reluctant to engage in whipsaw calculations because participants whose participation in a plan is terminated prior to normal retirement age would receive lump sum disbursements larger than their hypothetical account balances. Despite the existence of regulations upholding whipsaw calculations, sponsors of cash balance plans have argued that whipsaw calculations are not required under ERISA. *See* T.R. § 1.411(a)-11(d), 26 C.F.R. § 1.411(a)-11(d)-11(d); I.R.S. Notice 96-8. Several courts have addressed this issue and have consistently held that ERISA's valuation rules are valid and that cash balance must comply with these valuation rules even if such compliance results in a whipsaw effect. *See Xerox*, 338 F.3d at 763; *Esden*, 229 F.3d at 165-68.[7]

Based on these authorities, Plaintiffs argue that the administrators of the AK Steel Plan were required to engage in a whipsaw calculation when

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[7] In *Esden*, the court explained the purpose of ERISA's valuation rules:

> For the purposes of [actuarial equivalence], the regulations do not leave a plan free to choose its own methodology for determining the actuarial equivalent of the accrued benefit expressed as an annuity payable at normal retirement age. If plans were free to determine their own assumptions and methodology, they could effectively eviscerate the protections provided by ERISA's requirement of "actuarial equivalence."

Esden, 229 F.3d at 164.

calculating their early lump sum disbursements. Under the current administration of the AK Steel Plan, lump sum disbursements paid prior to normal retirement age are equal to the amount of a participant's hypothetical account balance at the time he or she stopped participating in the plan. Plaintiffs' contend that this practice violates ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), because such lump sum disbursements are not the actuarial equivalent of the annual benefit to which Plaintiffs would have been entitled if they had remained in the AK Steel Plan until age 65.

Defendants disagree, arguing that the facts of the present case distinguish it from the case law upholding whipsaw calculations. Specifically, Defendants argue that, under the AK Steel Plan, the projection rate is a statutory rate established by ERISA rather than the rate established by the AK Steel Plan. Furthermore, Defendants argue that, due to changes in the law, the discount rate that should be used in the calculation of an AK Steel Plan participant's lump sum disbursement is not established by ERISA, as was the case in the *Xerox* and *Esden* cases. If Defendants' prevail on both of these arguments, the projection and discount rates would be the same. Therefore, the rates would cancel each other out and the amount of Plaintiffs' lump sum disbursements would be the same as their hypothetical account balances.

a. Projection Rate

Defendants argue that to the extent that any projection forward is required, the projection rate is established by ERISA rather than the terms of the AK Steel Plan.[8] Specifically, Defendants contend that the projection rate of a participant's hypothetical account balance is controlled by ERISA § 204 (c)(3), 29 U.S.C. § 1054(c)(3).[9] According to Defendants, the purpose of § 204 (c)(3) is to convert a "plan accrued benefit" that is in the form of a non-annuity, such as a hypothetical account balance, into an annual benefit commencing at normal retirement age. Defendants' characterize the product of this conversion as a participant's "statutory accrued benefit".[10] Because the administrators of the AK Steel Plan view a participant's "plan accrued benefit" as the

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[8] Defendants contend that the Xerox and Esden courts were never presented with this particular argument and therefore, did not consider it when reaching their respective holdings.

[9] ERISA § 204(c)(3) provides as follows:

> For the purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

[10] The terms "plan accrued benefit" and "statutory accrued benefit" do not appear anywhere in ERISA's statutory scheme.

participant's hypothetical account balance, Defendant's argue that § 204(c)(3) controls the projection of a participant's hypothetical account balance to normal retirement age.

The Court need not reach the merits of Defendant's interpretation of § 204(c)(3) because Defendant's argument fails on a more fundamental basis. The premise underlying Defendants' entire argument is that a participant's accrued benefit under the AK Steel Plan is the participant's hypothetical account balance. However, § 1.2 of the AK Steel Plan plainly states that the term "accrued benefit" means "[a participant's hypothetical account] payable in the form of a single life annuity commencing on a Participant's Normal Retirement Date . . . that is the Actuarial Equivalent of the Participant's current Account."[11] (Doc. 39, Exh. 2, § 1.2) (emphasis added). Thus, contrary to Defendants' premise, a participant's accrued benefit under the AK Steel Plan is an annuity rather than his or her hypothetical account balance. Consequently, it does not appear that the

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[11] Section 1.2 provides in full:

> "Accrued Benefit" means that Accounts payable in the form of a single life annuity commencing on a Participant's Normal Retirement Date (or, if later, such Participant's actual retirement date) that is the Actuarial Equivalent of the Participant's current Account. The Account is projected to Normal Retirement Date and converted to a single life annuity using the factors set forth in Exhibit I. This single life annuity shall be determined by dividing the then current value of such Participant's Account by the applicable factor as described in Section A of Exhibit I.

(Doc. No. 39, Exh. 2, § 1.2)

provisions § 204(c)(3) are even triggered with respect to the projection forward of a participant's hypothetical account balance.

Despite the plain language of § 1.2, Defendants contend that a participant's accrued benefit under the AK Steel Plan is, in fact, his or her hypothetical account balance rather than the single life annuity referenced in § 1.2. Defendants argue that § 1.2 is merely the incorporation of the provisions of § 204(c)(3) into the AK Steel Plan. Thus, according to Defendants, § 1.2 defines a participant's "statutory accrued benefit" not a participant's "plan accrued benefit".

Defendants' argument, although creative, ignores a fundamental principle of ERISA law - the plain language of the plan controls. *E.g.*, *Marquette General Hospital* v. *Goodman Forest Industries*, 315 F.3d 629, 633 (6th Cir. 2003) ("ERISA plans should be interpreted 'according to their plain meaning, in an ordinary and popular sense.'" (quoting *Perez* v. *Aetna Life Ins. Co.*, 150 F.3d 550, 556 (6th Cir. 1998)) The AK Steel Plan does not distinguish between a "plan accrued benefit" and a "statutory accrued benefit". Under the plain language of the Plan, the term "accrued benefit" is defined as a single life annuity commencing at normal retirement age. Accordingly, a participant's accrued benefit under the AK Steel Plan is in the form of an annual benefit commencing at normal retirement age. If the Plan drafters had intended otherwise, (*i.e.*, that § 1.2 merely be a restatement of § 204(c)(3)), they could have indicated that intent in the language of the Plan. They did not do so. Therefore, because a participant's accrued benefit is defined by the AK Steel Plan in the form of

an annual benefit commencing at age 65, the provisions of § 204 (c)(3) are not implicated in the projection of a participant's hypothetical account balance.

Under I.R.S. Notice 96-8, *Xerox*, and *Esden*, the projection rate is the rate at which future interest credits are calculated. I.R.S. Notice 96-8 (III) (B) (1), *Xerox*, 338 F.3d at 760; *Esden*, 229 F.3d at 165-68. Neither of the parties have provided the Court with a clear understanding of the rate at which the AK Steel Plan calculates future interest credits. It appears that the parties anticipate that the rate will be determined during the damages phase of this litigation in the event the Court finds in favor of Plaintiffs on liability.[12]

b. Discount Rate

In addition to disagreeing on the projection rate, the parties also disagree on the appropriate dis-

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[12] During briefing of their respective motions, both parties have argued that the appropriate projection rates can be found in Exhibit I of the AK Steel Plan. Plaintiffs' argue that the appropriate rate can be found in Exhibit I (A) while Defendants' argue that it can be found in Exhibit I(C). The Court is not convinced that either of the parties are correct on this point. The interest credit rate for Future and Opening Accounts is established in § 3.3 of the AK Steel Plan. The Court believes it is this rate that should be used when projecting Plaintiffs' hypothetical account balances to normal retirement age.

When determining the projection rate under § 3.3, consideration must be given to minimum/maximum rates established by § 3.3 and to the appropriate methods for performing actuarial equivalency calculations using a variable interest rate. *See Esden*, 229 F.3d at 176 (projection rate could not fall below the 5.5 % floor established in the plan); *Xerox*, 338 F.3d at 760 (T.R. § 1.401(a)(4)-8(c)(3)(v)(B) provides the methods for performing calculations using a variable interest rate).

count rate that should be used when calculating the present value of a participant's accrued benefit. Plaintiffs argue that the present value calculation should be performed using the rates established by ERISA § 205(g)(3), 29 U.S.C. 1055(g)(3).[13] *See* ERISA § 203(e)(2), 29 U.S.C. § 1053(e)(2). In support of their argument, Plaintiffs rely on T.R. § 1.411(a)-11(d), 26 C.F.R. § 1.411(a)-11(d),[14] and I.R.S. Notice 96-8, both of which require that the present value calculation for consensual lump sum disbursements be performed using the discount rates established in ERISA § 205(g)[15]. The requirements of T.R. § 1.411(a)-11(d) and I.R.S. Notice 96-8 have been upheld by a number of courts. *Xerox*, 338 F.3d at 762 ("I.R.S. Notice 96-8 is "an authoritative interpretation of the applicable [ERISA] statutes and regulations . . . ") (citing *Esden*, 229 F.3d at 168-69)); *Esden*, 229 F.3d at 168-71, 173-74; *Lyons* v. *Georgia-Pacific Corporation*, 221 F.3d 1235, 1249 (11th Cir. 2000) ("*Lyons II*"), cert. denied, 532 U.S. 967, 149 L. Ed. 2d 388, 121 S. Ct. 1504 (2001).

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[13] ERISA and the I.R.C. have a number of parallel provisions with nearly identical wording. *Lyons*, 221 F.3d at 1243. ERISA § 205(g) is the counterpart to I.R.C. § 417 (e) and ERISA § 203(e) is the counterpart to I.R.C. 411(a)(11). To avoid confusion, the Court will only refer to the ERISA code sections.

[14] T.R. § 1.411(a)-11(d) was promulgated under I.R.C. § 411(a)(11). ERISA § 3002(c), 29 U.S.C. § 1202 (c), makes T.R. § 1.411(a)-11(d) applicable to ERISA § 203 (e).

[15] T.R. § 1.411(a)-11(d) and I.R.S. Notice 96-8 refer to I.R.C. § 411(e). However, as explained in footnote 14, such regulations are also applicable to ERISA § 203(e).

Defendants argue that the § 205(g)(3) rates are not applicable in this case because T.R. § 1.411(a)-11(d) was invalidated when ERISA § 203(e), the ERISA statute underlying T.R. § 1.411(a)-11(d), was amended in 1994. To fully understand Defendants argument, a review of the history of § 203(e) is required.

ERISA § 203(e) was enacted in 1984, prior to the advent of cash balance accounts. As originally enacted, § 203(e), which was titled "Restrictions on mandatory distributions", required that a participant's consent be obtained before a participant's accrued benefit could be distributed as a lump sum if the present value of the participant's accrued benefit exceeded $ 3500.[16] The second paragraph of the statute established the rate at which the present value calculation should be performed. ERISA § 203(e)(2). It is Defendant's position that the sole application of

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[16] The 1984 version of § 203(e) provides:

> (e) Restrictions on mandatory distributions
>
> (1) If the present value of any accrued benefit exceeds $ 3,500, such benefit shall not be treated as nonforfeitable if the plan provides that the present value of such benefit could be immediately distributed without the consent of the participant.
>
> (2) For purposes of paragraph (1), the present value shall be calculated by using an interest rate not greater than the interest rate which would be used (as of the date of the distribution) by the Pension Benefit Guaranty Corporation for purposes of determining the present value of a lump sum distribution on plan termination.

Pub. L. No. 98-397 § 105(1984); 29 U.S.C. § 1053(e) (1985).

§ 203(e)(2) was to calculate the present value of a participant's accrued benefit for the purpose of determining whether the present value of the benefit exceeded $ 3500. Defendant's interpretation of § 203(e)(2) is based on the legislative history[17] of the statute and on the fact that § 203(e)(2) opened with the phrase "for the purposes of paragraph (1)", indicating that the present value calculation of paragraph 2 was only performed to determine the need for consent described in paragraph 1. The signifi-

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[17] In support of their position, Defendants point to the Senate Report accompanying the 1984 Act, which states as follows:

> Under present law, in the case of an employee whose plan participation terminates, a pension, profit-sharing, or stock bonus plan (pension plan) may involuntarily "cash out" the benefit (i.e., pay out the balance to the credit of a plan participant without the participant's consent) if the present value of the benefit does not exceed $ 1,750 ...
>
> ...
>
> Explanation of Provisions
>
> The bill provides that, if the present value of an accrued benefit exceeds $ 3,500, then the benefit is not to be considered non-forfeitable if the plan provides that the present value of the benefit can be immediately distributed without the consent of the participant ... Under the bill, the interest rate to be used in determining whether the present value of a benefit exceeds $ 3,500 is not to be greater than the interest rate that would be used (as of the date of distribution) by the Pension Benefit Guaranty Corporation (PBGC) for the purposes of determining the present value of a lump sum distribution upon termination of the plan.

S. Rep. No. 98-575 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2569 (emphasis added).

cance of Defendants' argument will become apparent as the Court proceeds with its analysis.

In 1986, § 203(e) was amended. The discount rate established in § 203(e)(2) was replaced with discount rates that varied depending on whether a participant's accrued benefit was at or above or below $ 25,000.[18] Additionally, the heading of § 203(e) was changed from "Restrictions on mandatory distribu-

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[18] The 1986 version of § 203(e) provides:

> (e) Consent for distribution; present value; covered distributions
>
> (1) If the present value of any nonforfeitable benefit
>
> with respect to a participant in a plan exceeds $ 3,500, the plan shall provide that such benefit may not be immediately distributed without the consent of the participant.
>
> (2)(A) For purposes of paragraph (1), the present value shall be calculated -
>
> (i) by using an interest rate not greater than the applicable interest rate if the vested accrued benefit (using such rate) is not in excess of $ 25,000, and
>
> (ii) by using an interest rate no greater than 120 percent of the applicable interest rate if the vested accrued benefit exceeds $ 25,000 (as determined under clause (I)).
>
> In no event shall the present value determined under subclause (ii) be less than $ 25,0000.
>
> (B) For purposes of subparagraph (A), the term "applicable interest rate" means the interest rate which would be used (as of the date of the distribution) by the Pension Benefit Guaranty Corporation for purposes of determining the present value of a lump sum distribution on plan termination.

29 U.S.C. § 1053(e)(1990).

tions" to "Consent for distribution; present value; covered distributions."[19] 19 Shortly thereafter, T.R. § 1.411(a) -11(d) was promulgated requiring consensual lump sum disbursements to be discounted using the rates established in § 205(g).[20]

In *Esden* and *Lyons II*, T.R. § 1.411(a)-11(d) was challenged on the grounds that it exceeded the scope of the statute under which it was promulgated and was, therefore, invalid under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).[21] *Esden*, 229 F.3d at 173; *Lyons II*, 221 F.3d at 1244. Specifically, it was argued that § 203(e) only applied to non-consensual lump sum disbursements, not consensual lump sum disbursements.[22] *Esden*, 229 F.3d at 173; *Lyons II*, 221 F.3d at 1245. The *Esden* and *Lyons II* courts disagreed. *Esden*, 229 F.3d at 174; *Lyons II*, 221 F.3d at 1245. The courts noted that the statute accounted for accrued benefits up to and in excess of $ 25,000 when calculating the present value of a participant's accrued benefit. *Id.* The courts rea-

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[19] The heading change occurred later in 1986 and was made by the Office of the Law Revision Counsel. Lyons II, 221 F.3d at 1246, fn. 19.

[20] T.R. § 1.411 (a)-11(d) refers to I.R.C. § 417(e). The ERISA counterpart to § 417(e) is § 205(g).

[21] Under *Chevron*, a regulation is only valid if (1) Congress has not directly addressed the issue in question and (2) the agency's interpretation is based on a permissible construction of the statute. 467 U.S. at 843-43.

[22] A lump sum disbursement that was $ 3,500 or less was non-consensual because under § 203(e), a participant's consent was not required for disbursement of the benefit.

soned that if the statute was intended to apply only to non-consensual lump sum disbursements, Congress would not have included provisions to cover benefit amounts in excess of the non-consensual limit of $ 3,5000. *Id.* Based on the inclusion of such provisions, the *Esden* and *Lyons II* courts concluded that the statute applied to consensual as well as non-consensual lump sum disbursements.[23] *Esden*, 229 F.3d at 175; *Lyons II*, 221 F.3d at 1246. Consequently, the *Esden* and *Lyons II* courts held that T.R. § 1.411(a)-11(d) was valid under a Chevron analysis because it was a permissible construction of § 203(e). *Esden*, 229 F.3d at 175; *Lyons II*, 221 F.3d at 1249.

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[23] The legislative history seems to support this conclusion. The House Conference Report accompanying the 1986 amendments stated as follows:

> If the present value of the vested accrued benefit is no more that $ 25,000, then the amount to be distributed to the participant or beneficiary is calculated using the PBGC rate. If the present value of the accrued benefit exceeds $ 25,000 (using the PBGC interest rate), then the conference agreement provides that the amount to be distributed is determined using an interest rate no greater than 120 percent of the interest rate ... that would be used by the PBGC (as of the date of distribution) upon the plan's termination . . . For example, assume that, upon separation from service, the present value of an employee's total accrued benefit . . . is $ 50,000 using the applicable PBGC rate. Under the conference agreement, the plan may distribute to his employee ... the total accrued benefit, calculated using 120 percent of the applicable PBGC rate (*e.g.*, $ 47,000).

H.R. Conf. Rep. 99-841, pt. 3(1986), reprinted in 1986 U.S.C.C.A.N. 4075.

In 1994, § 203(e) was amended again by the Retirement Protection Act of 1994.[24] The amended statute eliminated the differing rates in paragraph 2 and replaced them with the rates established in § 205(g)(3), 29 U.C.C. § 1055 (g) (3). Two years later in 1996, I.R.S. Notice 96-8 was published requiring that the present value calculation for consensual lump sum disbursements be performed using the rates established in § 205(g)(3).

Defendants argue that T.R. § 1.411(a)-11(d) was invalidated by the 1994 amendment of § 203(e) because it could no longer be read as applying to consensual lump sum disbursements after the reference to accrued benefits up to and in excess of $ 25,000 was removed. Simply put, Defendants' argue that when § 203(e) was amended in 1994, it reverted back to its pre-1986 form. As discussed previously, it is Defendants' position that the pre-1986 § 203(e) only applied to non-consensual lump sum disbursements. Accordingly, Defendants argue that T.R. § 1.411(a)-11(d) is not a "permissible contruction[s]" of § 203(e),

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[24] The 1994 version of § 203(e) provides:

> (e) Consent for distribution; present value; covered distributions
>
> (1) If the present value of any nonforfeitable benefit with respect to a participant in a plan exceeds
>
> $ 5,000, the plan shall provide that such benefit may not be immediately distributed without the consent of the participant.
>
> (2) For purposes of paragraph (1), the present value shall be calculated in accordance with section 1055(g)(3) of this title.

because the 1994 version of the statute does not apply to consensual lump sum disbursements. In support of their argument, Defendants rely on *Lyons* v. *Georgia-Pacific Corp. Salaried Employees Retirement Plan*, 196 F. Supp. 2d 1260, 1271-72 (N.D. GA 2002) ("*Lyons III*"), in which the court held that T.R. §§ 1.411(a)-11(d) does not apply to consensual lump sum disbursements made after the 1994 amendment to § 203(e).[25]

The Court finds neither Defendants' argument nor the reasoning of *Lyons III* persuasive on this point. Defendants' argument that the 1994 version of § 203(e) only applies to non-consensual lump sum disbursement is based on his contention that the pre-1986 version of § 203(e) only applied to non-consensual lump sum disbursement. As previously discussed, Defendant's position regarding the scope of the pre-1986 version of § 203(e) is based on (1) the "limiting" phrase at the beginning of § 203(e)(2) and (2) the legislative history.

Whatever the purpose of the phrase at the beginning § 203(e)(2), it does not appear that its pur-

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[25] In *Lyons I*, 66 F. Supp. 2d 1328 (N.D. GA 1999), the court determined that T.R. § 1.411(a)-11(d) was invalid under a Chevron analysis. This decision was reversed by the *Lyons II* court, which concluded that the regulations were valid under the 1986 version of § 203(e). *Lyons II*, 221 F.3d at 1244-45. With respect to consensual lump sum disbursements made after the 1994 amendment to § 203(e), the *Lyons II* court stated that 1994 amendment "may or may not compel a different conclusion as to lump sum distributions made after the effective date of the 1994 legislation." In *Lyons III*, the court seized on this statement by that appellate court to revive its *Chevron* analysis with respect to post-1994 consensual lump sum disbursements.

pose was to limit the application of § 203(e) to non-consensual lump sum disbursements. The version of the statute analyzed by the *Esden* and *Lyons II* courts included the identical phrase, but neither of these courts found that the phrase limited the present value calculation to the determination of consent as required in § 203(e)(1).

Moreover, it seems clear from the legislative history of the 1986 and the 1994 amendment that Congress did not intend the phrase to be so limiting. The legislative history accompanying the 1986 amendment indicated a clear intention that § 203(e) should apply to consensual disbursements.[26] When the statute was amended in 1994, the legislative history did not indicate that Congress was amending the statute to limit is applicability to non-consensual disbursements only. On the contrary, the legislative history indicates that Congress contemplated that the statute would apply to any lump sum disbursement and was only amended for the purpose of remedying the manner in which the PBGC rate was used by the statute.[27] Thus, even if the legislative

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[26] *Supra*, at fn. 23.

[27] The House Report accompanying the 1994 amendment provided the following explanation for the change:

> The plan must [currently] value a single-sum payment using an interest rate no greater than the applicable PBGC interest rate. (If the value exceeds $ 25,000, the interest rates must be no greater than 120% of the applicable PBGC rate.) PBGC regulations have been revised to change the methodology for calculating the applicable PBGC interest rate for terminated plans. The change in the regulations does not apply for purposes of

(...continued)

history accompanying the original enactment of § 203(e) can be interpreted as limiting the scope of § 203(e) to non-consensual lump sum disbursements, the legislative history accompanying subsequent amendments indicates no such intent to limit the scope of § 203(e).[28] In fact, subsequent legislative history seems to indicate that Congress intended the

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> determining the applicable interest rate for valuing single-sum payments. A plan may use any reasonable mortality table it specifies.
>
> Congress adopted the interest rate cap to prevent plans from using unreasonably high interest rates to determine the present value of participants' benefits. If plans could use high interest rates, plans could lower the single sum paid to participants. The PBGC interest rates were adopted as the standard because the rates were presumed to duplicate group annuity rates. However, the PBGC interest rates reflect annuity rates only if considered in combination with specified PBGC mortality tables, and the law does not require that the specified PBGC mortality tables be used.
>
> Sections 405(a)and 405(c) of the bill amend sections 203(e)and 205(g) of ERISA and section 411(a)(11)and 417(e) of the Code to change the manner in which single sum distributions must be valued for purposes of these sections. Under the bill, single sum distributions may not be less than the amount that would be derived using the 30-year Treasury bond rate as of the date of distribution and a mortality table prescribed by the Secretary of the Treasury . . .

H. Rep. No. 103-632, pt. 2, Section 405 (1994)(emphasis added).

[28] It is not altogether clear from the legislative history that § 203(e), as originally enacted, was intended only to apply to non-consensual lump sum disbursements. In *Lyons II*, the Court noted that the legislative history accompanying the 1984 enactment "spoke in broader terms" than just mandatory distributions. *Lyons II*, 221 F.3d at 1242, fn. 10.

statute to apply to all lump sum disbursements, consensual or non-consensual.

Moreover, although certainly not determinative, it is noteworthy that when § 203(e) was amended in 1994, the heading of the statute remained "Consent for distribution; present value; covered distributions" and was not changed back to "Restrictions on mandatory distributions", further indicating a lack of intent to limit the application § 203(e) to non-consensual lump sum disbursements.

Finally, both the *Esden* and *Xerox* courts indicated that the 1994 amendment of § 203(e) had no effect on their holdings that T.R. §§ 1.411(a)-11(d) did not exceed the scope of § 203(e).[29]

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[29] When discussing the legislative history of § 203(e), the *Esden* court noted the continuing intent of Congress to regulate the discount rate that plans could use to calculate lump sum disbursements:

> The legislative history accompanying the Tax Reform Act of 1986, which introduced these consent and valuation restrictions, evidences a congressional intent to apply these valuation rules to all distributions. *See* H.R. Conv. Rep. No 99-841, pt. 2, at 488 (1986), reprinted in 1986 U.S.C.C.A.N. at 4075, 4576, reprinted in 1986-3 C.B. Vol. 4 at 488 (using an illustrative example of an employee with a $ 50,000 accrued benefit). And, in 1994, when Congress amended these provisions to replace the PBGC rate with the 30-year long-bond rate, it explained again its intention:
>
> > Congress adopted the interest rate cap to prevent plans from using unreasonably high interest rates to determine the present value of participants' benefits. If plans could use high interest rates, plans could lower the single sum paid to participants.

(...continued)

For all of these reasons, the Court concludes that the 1994 version of § 203(e) is ambiguous as to whether it applies to consensual as well as non-consensual lump sum distributions. In such a situation, regulations are permissible provided they are reasonable. *See e.g., Lyons III*, 221 F.3d at 1248. Numerous courts have found these regulations to be reasonable and Defendants' have not presented any

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H.R. Rep. No. 103-632, pt. 2, at 54 (1994) (emphasis added) reprinted in 1994.

> If there were no regulation of the discount rates that plans could use in calculating lump sum equivalents of accrued normal retirement benefits, they could eviscerate the protective provisions of ERISA

Esden, 229 F.3d at 175 (emphasis added).

Similarly, when discussing the appropriate discount rate, the *Xerox* court explained that new pension plans (*i.e.*, post-1994 plans) would use the 30-year T-bill rate. 338 F.3d at 760. The Court specifically cited to the 1994 version § 203(e)(2) in support of this proposition, indicating that the Court viewed the 1994 version of the statute as applying to consensual lump sum disbursements. *Id.*

The *Lyons II* court, however, alluded to the possibility that T.R. §§ 1.411(a)-11(d) would not be valid under the 1994 version of § 203(e):

> In the Retirement Protection Act of 1994, Congress removed the language relating to the calculation of present value amounts in excess of $ 25,000, thereby lessening (or perhaps removing) the ambiguity or self-contradictory nature of the § 203(e) provisions. That amendment may or may not compel a different conclusion as to lump sum distributions made after the effective date of the 1994 legislation.

221 F.3d at 1246.

arguments that would change this conclusion.[30] 30 *Xerox*, 338 F.3d at 760; *Esden*, 229 F.3d at 174, Lyons III, 221 F.2d at 1249. Therefore, HN11 the Court finds that T.R. §§ 1.411(a)-11(d) is valid with respect to lump-sum disbursement made after the amendment of § 203(e) in 1994.

Thus, under ERISA, the present value calculation for consensual lump sum disbursements should be performed using the discount rates established in ERISA § 205(g)(3), 29 U.S.C. § 1055 (g) (3), as required by T.R. §§ 1.411(a)-11(d) and I.R.S. Notice 96-8.

IV. CONCLUSION

Therefore, the Court concludes that the manner in which Plaintiffs' lump sum disbursements were calculated under the AK Steel Plan violated ERISA and the I.R.C. Consequently, Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 37) with respect to liability is hereby GRANTED. Defendants' Motion for Summary Judgment (Doc. No. 39) is DENIED. This matter will proceed on the issue of damages.

IT IS SO ORDERED

Date: April 8, 2004
/s
Sandra S. Beckwith
United States District Judge

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[30] A number of Defendants' other arguments are based on policy considerations. Such considerations are within the purview of the legislature, and the Court will not ignore the statutory and administrative scheme of ERISA based on such considerations.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN D. WEST, on Behalf of
Himself and All Other Persons
Similarly Situated

Plaintiff,

vs.

AK STEEL CORPORATION
RETIREMENT ACCUMULATION
PENSION PLAN, et al.

Defendant.

Case 1:02-cv-0001

ORDER

This matter is before the Court on Defendant's Motion to Dismiss Plaintiffs' Claims (Doc. No. 58). Plaintiffs filed an opposition (Doc. 67), to which Defendant replied (Doc. 71). Defendant's motion contends that a recent decision from the Sixth Circuit, *Crosby* v. *Bowater*, 382 F.3d 587 (6th Cir. 2004), requires this Court to dismiss Plaintiffs' Complaint under Fed. R. Civ. P. 12(b)(1).

Background

This action was brought by John West, for himself and a class of former participants of AK Steel

Corporation's pension ("Plan"), against the Plan and its administrative committee. Plaintiff alleges that the Plan violated provisions of the Employee Retirement Income Act of 1974 ("ERISA") and the Internal Revenue Code ("IRC"). After granting class certification (Doc. 55), this Court granted partial summary judgment to the Plaintiffs (Doc. 56), holding that the manner in which the Plan calculated Plaintiff's lump sum retirement benefit violated ERISA. Briefly summarized, this Court found that Section 1.2 of the Plan clearly defines "accrued benefit" as a participant's hypothetical account, in the form of a single life annuity, that is the "actuarial equivalent" of the participant's current account. The Court rejected Defendant's argument that the projection rate for deriving that "actuarial equivalent" is found in ERISA (29 U.S.C. §1054(c)(3)), rather than within the Plan itself. This Court also found that the 1994 amendment to ERISA Section 203(e), 29 U.S.C. §1053(e), ambiguous with respect to its coverage of consensual lump distributions. Therefore, the Court found that Treasury Regulation §1.411(a)-11(d) was valid with respect to post-1994 distributions, and that the present value discount rates set forth in 29 U.S.C. §1055(g)(3) should have been used by the Plan.

The Sixth Circuit issued its decision in *Crosby v. Bowater Inc. Retirement Plan*, 382 F.3d 587 (6th Cir. 2004), on September 9, 2004. There, Crosby's employer, Bowater, sold the plant where Crosby worked, entitling Crosby to a lump sum payment of his accrued retirement benefit. He initially questioned the amount of the payment, which equaled his account balance (per a section of the plan), and asked the administrator to re-calculate using a "whipsaw"

formula. The administrator agreed to do so, resulting in a higher payment to Crosby. The district court's decision noted that Bowater's plan was silent as to the whipsaw formula used, and granted the administrator discretion to make such plan interpretations. See *Crosby* v. *Bowater*, 212 F.R.D. 350, 354 (W.D. Mich. 2002). Despite the higher payment, Crosby was unhappy with the administrator's use of a pre-retirement mortality discount as a part of that whipsaw calculation. After exhausting his administrative remedies, he filed suit.

Crosby's suit in the district court sought relief exclusively under Section 502(a)(3), 29 U.S.C. §1132(a) (3), which permits suits to enjoin practices which violate ERISA or plan terms, and for appropriate equitable relief. Crosby sought a judgment ordering the defendant to recompute the lump sum benefits, to pay additional benefits to him and to all employees who had already received lump sum payments, and to enjoin the defendant from utilizing the mortality discount in the future. Defendant moved to dismiss, arguing that Section 502(a) (3) does not authorize suits for payments of benefits, which the defendant claimed was precisely what Crosby was seeking. The district court, however, granted Crosby summary judgment on the merits, finding that Crosby's request for relief was sufficiently "equitable" to permit his claim under Section 502(a)(3).

The Sixth Circuit reversed. It held that "Section 502(a)(3) does not authorize a plan participant to sue for recovery of benefits due to him under the terms of the plan. That is the office of §502(1) (B) - a section with which Mr. Crosby has always insisted he will have nothing to do." *Crosby*, 382 F.3d at 594.

In so holding, the Sixth Circuit followed *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204 (2002). Under Knudson, courts considering Section 502(a)(3) claims "must determine whether the relief sought is truly equitable." *Knudson*, 534 U.S. at 209-10 (as quoted in *Oualchoice, Inc.* v. *Rowland*, 367 F.3d 638, 643 (6th Cir. 2004)). Because Crosby was clearly seeking a judgment ordering the defendant to pay him additional benefits (the amount of which had already been calculated), the Sixth Circuit held that Crosby's action was not "truly equitable," and thus the district court lacked subject matter jurisdiction.

In reaching this conclusion, the Sixth Circuit specifically noted that Crosby had not attempted to amend his complaint in the district court to bring a claim under Section 502(a)(1)(B). The Court also noted that Crosby's appeal brief asserted he could not bring his claim under that section. For reasons that are not entirely clear to this Court, Crosby believed he was foreclosed from an action under Section 502 (a) (1)(B), a belief about which the Sixth Circuit stated: "We intimate no view as to whether this proposition is correct." *Crosby*, 382 F.3d at 591, n. 5.

ANALYSIS

Defendant's motion argues that this case must be dismissed because the Plaintiffs here, like Crosby, are seeking money damages and so cannot bring a claim under §502(a)(3). Defendant also argues that because Plaintiffs allege that the AK Steel Plan violates ERISA, they are not seeking benefits "under the terms of the plan" for purposes of Section 502 (a)(1)(B), and thus Plaintiffs cannot bring any claim at all. Indeed, Defendant's Reply specifically argues-

that Plaintiff West just waited "too long" to complain about his lump sum distribution, and so he should be barred from recovery.[31]

Defendant's argument ignores the basis for this Court's previous grant of partial summary judgment to Plaintiff. This Court has already found that the Plan plainly defines the term "accrued benefit" as a single life annuity commencing at normal retirement age. The Court rejected Defendant's argument that the projection rate for a participant's account is controlled by the ERISA statute, rather than by the plain terms of the Plan. Clearly, Plaintiffs are "participants" in the Plan, and they are seeking Plan benefits "under the terms of the Plan." The fact that they challenge the section of the Plan concerning the lump sum benefit calculation does not, and should not, doom their claim.

More importantly, the Plaintiffs in this case, unlike Mr. Crosby, expressly bring their claims under Sections 502(a)(1)(B) and (a)(3). Comp. ¶ 1. The Complaint is styled "Class Action Complaint for Damages and Other Relief." Nothing in *Crosby* suggests that this alternative pleading for relief is now impermissible. To the contrary, *Crosby* confirms long-standing law; in fact Defendant noted in its own motion for judgment on the time-bar issue that Plaintiff could not recover money damages under Section 502(a)(3). (See Doc. 20, p. 6 at n. 3.) Plaintiffs

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[31] This Court previously denied Defendant's motion for entry of judgment because Plaintiffs' claim is time-barred (Doc. 51). Defendant does not argue that Plaintiffs' claim is barred by the applicable statute of limitations.

may, however, obtain declaratory relief under that section. Nothing in *Knudson* or *Crosby* suggests that plan participants are barred from seeking a judgment that the plan violates ERISA and the consequent recovery of the correct amount of plan benefits under Sections 502 (a)(1)(B) and (a)(3).

But, Defendant now argues, Plaintiffs cannot maintain a claim under Section 502(a) (1) (B) either because Plaintiffs are not seeking a judgment under the Plan as it is written. Defendant cites several cases in support of its newfound argument. Defendant's cases are simply not relevant to the facts of this case. For example, in *Fraser* v. *Lintas*, 56 F.3d 722 (6th Cir. 1995) a fiduciary duty when it made a distribution to her without fully advising her of the potential tax consequences. She sought compensatory damages. Her claim plainly was not one for benefits under the terms of the plan. Similarly, in *Hughes* v. *General Motors Corp.*, 852 F.2d 568 (6th Cir. July 14, 1988) (unpublished), the plaintiff employees claimed they had relied on their employer's allegedly false oral assurances in opting for early retirement, when the employer knew at the time it would be offering enhanced benefits in the very near future and did not disclose that fact to the employees. The employees sued to obtain those enhanced benefits, but the court held they could not bring a § 502(a)(1)(B) a plan participant's ex-wife claimed that the plan breached claim because they were unquestionably not participants or beneficiaries of that new plan.

Defendant also cites *Ramsey* v. *Formica Corp*, 2004 WL 1146334 (S.D. Ohio April 6, 2004), involving an unfortunate situation of unintended overpay-

ment of benefits to plan participants. When the employer discovered the error, it notified the participants of a reduction in their benefits. Those employees then sought a preliminary injunction to prevent the reduction, which this Court denied. The terms of the plan were not violated by the reduction (indeed, the overpayments violated the plan). Plaintiffs freely admitted they were not entitled under the plan to the overpaid benefits they had been receiving. This Court therefore concluded that plaintiffs had not established the likelihood of success on the merits of a Section 502(a)(1)(B) claim.

Here, Plaintiffs contend that they are entitled to additional lump sum benefits under the terms of the Plan, because the Plan's treatment of lump sum payments violates ERISA. To accept Defendant's argument that Plaintiffs, cannot bring any claim, would in effect permit plan terms that blatantly violate ERISA to stand unchallenged, because once the benefits were paid, participants could not bring a claim under § 502 (a) (1) (B) for benefits "under the terms of the plan." As noted in *Clair* v. *Harris Trust*, 190 F.3d 495,498 (7th Cir. 1999), another case cited by Defendant, such a conclusion would leave a "big gap in ERISA's remedial scheme." Other courts have permitted claims very similar to Plaintiffs' claims here to proceed. See, e.g., *Esden* v. *Bank of Boston*, 229 F.3d 154 (2nd Cir. 2000), noting that plaintiff brought her claim under both Sections 502(a)(1)(B) and (a)(3) seeking money damages and an order barring the plan from using the challenged lump sum calculation method; and *Berger* v. *Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755 (7th Cir. 2003), where the Seventh Circuit sensibly de-

scribed plaintiffs' claim as one for declaratory relief, from which a recalculation and award of benefits would, hopefully, naturally flow.

CONCLUSION

For all of the foregoing reasons, Defendant's Motion to Dismiss Plaintiffs' Claims under *Crosby* v. *Bowater* (Doc. 58) denied.

DATED: November 22, 2004

s/ Sandra S. Beckwith
Sandra S. Beckwith,
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

JOHN D. WEST, on behalf of himself and all others similarly situated,

Plaintiff,

v.

AK STEEL CORPORATION (formerly Armco Inc.) RETIREMENT ACCUMULATION PENSION PLAN, et al.

Defendants.

No. 1:02-cv-0001

March 29, 2006

AMENDED FINAL JUDGMENT

On March 9, 2004, the Court entered an order granting Plaintiffs' motion for class certification. (Doc. 55) The Court certified a class defined as:

> All Vested participants in the AK Steel Corporation (formerly Armco Inc.) Retirement Accumulation Pension Plan who retired or were terminated from employment on or after January 1, 1995 and received their pension benefits under the Plan in the lump sum form of payment.

On April 8, 2004, the Court granted partial summary judgment to Plaintiff, finding that the method Defendants used to calculate Plaintiff's lump sum retirement payments violated certain provisions

of ERISA. (Doc. 56) The Court subsequently ordered that 92 individuals included in the original class certification were excluded from the class, based upon their execution of releases in connection with a reduction in force. (Doc. 119) The Court also ordered that certain individuals who had initially chosen to opt out of the class were to be included in the certified class. (Doc. 128) On December 19, 2005, the Court determined the manner by which to calculate the amounts due each class member, and determined the rate and time from which prejudgment interest should be computed. (Doc. 129)

On January 18, 2006, pursuant to the Court's order, the parties jointly filed under seal an agreed roster of the current class members and the amount due to each member, calculated under the terms of the Court's December 19, 2005 Order. (Doc. 134) Pursuant to that roster, the total amount of damages to be awarded to the Class is $37,638,442.79.

In accordance with the Court's previous order concerning prejudgment interest, the Court finds that prejudgment interest accrues from April 16, 2001 at the weekly average one year constant maturity Treasury yield, pursuant to 28 U.S.C. §1961(a), using the rate from the week preceding the entry of judgment. That rate for the week ending February 17, 2006 according to the Federal Reserve's website, is 4.70%.[32] Therefore, the Court awards prejudgment interest to each class member at the rate of 4.7%, accruing from the **later** of (1) April 16, 2001 or (2) the

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[32] http://www.federalreserve.gov/releases/h15/current/ accessed on February 21, 2006

date on which that class member received his or her lump sum distribution.

The Court is required to award a prevailing plaintiff postjudgment interest, at the rate defined by 28 U.S.C. §1961(a), on the total judgment inclusive of prejudgment interest. *Caffey* v. *UNUM Life Ins. Co.*, 302 F.3d 576, 585 (6th Cir. 2002). Accordingly, postjudgment interest shall accrue at the rate of 4.70% per annum on the total judgment until the date the judgment is paid in full by Defendants.

Therefore, in accordance with the Court's previous orders, the Court awards Plaintiffs $37,638,442.79 in damages, plus prejudgment interest according to the formula set forth above. Postjudgment interest shall accrue on the total amount of the judgment at the rate of 4.70% per annum until paid. Pursuant to Rule 54(d)(1) of the Federal Rules of Civil Procedure, Defendants shall pay the court costs of this litigation.

IT IS SO ORDERED.

DATED: March 29, 2006

/s/
Sandra S. Beckwith,
Chief Judge
United States District
Court

ERISA § 502(a), (e), 29 U.S.C. § 1132(a), (e)

Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [*29 USCS § 1109*];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [*29 USCS § 1025(c)*];

(5) except as otherwise provided in subsection (b) by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such vio-

lation or (ii) to enforce any provision of this title;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) or under subsection (i) or (1);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A) [*29 USCS § 1169(a)(2)(A)*]);

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1) [*29 USCS § 1021(f)(1)*], (A) to enjoin any act or practice which violates subsection (f) of section 101 [*29 USCS § 1021(f)*], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [subtitle] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract

or annuity, plus reasonable prejudgment interest on such amounts.

* * *

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1) [*29 USCS § 1021(f)(1)*]. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

ARMCO INC.

RETIREMENT ACCUMULATION PENSION PLAN

Effective January 1, 1995

and as Further Amended Effective July 1, 1995

ARTICLE I

DEFINITIONS

In the Plan, whenever the context so indicates, the singular or plural and the masculine, feminine or neuter gender shall each be deemed to include the others; the terms "he", "she", "his", "her" and "him" shall refer to an Employee, Eligible Employee, Participant or Beneficiary; reference to a Section of the Code or ERISA or any Regulation issued thereunder shall include any subsequent amendments to such Section; reference to an Article or Section heading shall not affect its meaning or interpretation; and the following terms shall have the meanings set forth below:

1.1 "Account" or "Accounts" means the Account or Accounts established and maintained for each Participant pursuant to the provisions of Article III, including Future Accounts and Opening Accounts (if applicable). The value of the Account shall not reflect the value of the Pre-62 30-Year Annuity. All Accounts are intended to be only bookkeeping accounts and neither the maintenance thereof nor the making of credits thereto shall be construed as an allocation of assets of the NCPP to, or a segregation of such assets in, any such Account, or otherwise as

creating a right in any person to receive specific assets of the NCPP.

1.2 "Accrued Benefit" means the Accounts payable in the form of a single life annuity commencing on a Participant's Normal Retirement Date (or, if later, such Participant's actual retirement date) that is the Actuarial Equivalent of the Participant's current Account. The Account is projected to Normal Retirement Date and converted to a single life annuity using the factors set forth in Exhibit I. This single life annuity shall b determined by dividing the then current value of such Participant's Account by the applicable factor as described in Section A of Exhibit I.

1.3 "Actuarial Equivalent" or "Actuariaily Equivalent" for any specified annuity or benefit means another annuity or benefit, commencing at a different date and/or payable in a different form than the specified annuity or benefit, but which has the same present value as the specified annuity or benefit, using the applicable factors described in Exhibit I.

1.4 "Adjustment Factor" means the cost of living adjustment factor prescribed by the Secretary of the Treasury under Code Section 401(a)(17)(B) or Code Section 415(d) applied to such Plan provisions in such manner as the Secretary shall prescribe.

1.5 "Adjusted Accrued Benefit" has the meaning set forth in Section 3.1.

1.6 "Affiliate" means any corporation which is included in a controlled group of corporations (within the meaning of Code Section 414(b)) which includes the Company, any trade or business

(whether or not incorporated) which is under common control with the Company (within the meaning of Code Section 414(c)), any organization included in the same affiliated service group as the Company (within the meaning of Code Section 414(m)), or any other entity required to be aggregated with the Company pursuant to the Regulations under Code Section 414(o). For purposes of applying the provisions of Articles XII and XIV, Code Section 415(h) shall apply in determining an "Affiliate".

1.7 "Beneficiary" means the person or persons or other legal entity who has been designated in Section 5.2 to receive any benefits payable upon the death of a Participant.

1.8 "Benefit Commencement Date" means (i) for an annuity form of distribution, the fast day of the first period for which an amount is payable as a benefit pursuant to the Plan, and (ii) for a lump sum payment, the date on which payment is made pursuant to the Plan.

1.9 "Board of Directors" means the Board of Directors of the Company.

1.10 "BPAC" means the Benefit Plans Administrative Committee appointed by the Board of Directors.

1.11 "'Break In Continuous Service" has the meaning set forth in the Section 8.3.

1.12 "Code" means the Internal Revenue Code of 1986, as amended.

1.13 "Company" means Armco Inc., an Ohio corporation.

1.14 "Continuous Service" has the meaning set forth in Section 8.1.

1.15 "Corporate Group" means the Company and each Affiliate. For the purposes of determining whether an employee of another company is an Employee and the length of his Continuous Service, each company shall be included in the "Corporate Group" only for such period or periods during which such company is an Affiliate or is otherwise required to be aggregated.

1.16 "Divested Unit" means a business of the Company (whether organized and operated as a division, a subsidiary or a division of a subsidiary) which has been sold or transferred as a going business to a third party (including a corporation, partnership or joint venture) not related to the Company or to a corporation, partnership or joint venture partly, owned by the Company or an Affiliate which is not itself an Affiliate, regardless of whether the sale or transfer is accomplished by means of a sale or transfer of the stock or by means of a sale or transfer of assets.

1.17 "Eligible Employee" means:

(a) any person who is employed by or paid through the payroll of an Employer as a salaried employee whose principal duties are in the United States or who is a United States citizen employed abroad, and whose terms and conditions of employment art not the subject of a collective bargaining agreement;

(b) hourly-paid Employees of the Employer working at the Coshocton Operations who were hired on or after January 1, 1994 in accordance with Appendix 1; or

(c) hourly-paid employees of the Employer working at the Coshocton Operations who elected to participate in the RAPP as of July 1, 1995 in accordance with Appendix 1;

but in each case excluding:

(1) any person represented by a recognized collective bargaining representative who has entered into a collective bargaining agreement which does not provide for participation under the Plan if pension benefits were a subject of good faith bargaining;

(2) any Leased Employee; and

(3) any foreign national working in the United States; and

(4) any Employee who was on idle time as of December 31, 1994 and who does not return to work for an Employing. Company.

1.18 "Eligibility Service" has the meaning set forth in Section 2.4.

1.19 "Employee" means each common law employee employed by an Employer or any Affiliate and each Leased Employee.

1.20 "Employer" or "Employing Company" means the Company and any other Affiliate as identified on Schedule 1 whose Employees are designated as Participants in the RAPP and which Affiliate adopts the RAPP in accordance with the procedures set forth herein. The term "Employs" or "Employing Company" shall not include any separate operating division or business unit which is purchased or oth-

erwise established by an Employer after January 1, 1995 until and unless the Eligible Employees of such division or unit are designated as Participants in the RAPP.

1.21 "ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

1.22 "Future Account" means the Account established for each Participant under Section 3.2.

1.23 "Hour of Service" has the meaning set forth in Section 2.4.

1.24 "Interest Credit Percentage" has the meaning set forth in Section 3.3.

1.25 "Layoff" means an involuntary, temporary discontinuance of employment under a written layoff policy that, at the time of discontinuance, is either declared by the Employer to be temporary or is reasonably believed by the Employer at the time of the initial layoff to be temporary, and shall include voluntary layoff status which an Employee elects in lieu of immediate termination of employment as a matter of right under written Employer policies regarding layoff status.

1.26 "Leased Employee" means any person who pursuant to an agreement between the Employer and a leasing organization has performed services for the Employer on a substantially full time basis for a period of at least 1 year and such services are of a type historically performed by employees in the business field of the Employer. Contributions or benefits provided by the leasing organization which are attributable to services performed for the Employer shall be treated as provided by the Employer.

1.27 "NCPP" refers to the Armco Inc. Noncontributory Pension Plan, originally effective January 1, 1950 and as in effect on January 1, 1995, and shall include the RAPP as a separate cash balance formula. Any reference in this Plan document to the NCPP shall not include the RAPP except where otherwise expressly provided.

1.28 "Normal Retirement Age" means the later of age 65 or the age of the Participant upon the 5th anniversary of his initial participation in the Plan.

1.29 "Normal Retirement Date" means the first day of the month coincident with or next following the date on which a Participant attains Normal Retirement Age.

1.30 "Opening Account" means the Account established under Section 3.1 for certain Employees who were Participants in the NCPP on December 31, 1994 and who became Plan Participants on January 1, 1995.

1.31 "Participant" means an Eligible Employee or former Eligible Employee who has qualified for participation in accordance with the terms of Article II who has not received a distribution of his entire Account under the RAPP.

1.32 "PBGC" means the Pension Benefit Guaranty Corporation.

1.33 "Pension Fund" means the assets of the NCPP held in the Trust to fund the benefits in the Plan.

1.34 "Pensionable Earnings" means base salary (prior to deferrals made under Code Sections 125 and 401(k)), plus salary continuation payments,

premiums for overtime worked (overtime premiums, Sunday premiums, holiday pay for holidays worked or not worked, and shift pay) and cash payments under performance incentive plans, profit sharing, gain sharing, lump-sum merits and lump-sum special recognition awards and excluding all other forms of compensation, taxable fringe benefits and severance pay. Payments of any kind made after the end of the month in which a Participant incurs a Break in Continuous Service or is placed on idle time shall not constitute Pensionable Earnings.

Pensionable Earnings in a Plan Year in excess of $150,000 (subject to the Adjustment Factor) shall be disregarded for all purposes under the RAPP. In determining the Pensionable Earnings of an Employee, the rules of Code Section 414(q)(6) shall apply, *except that in applying such rules, the term "family" shall include only the Spouse of the Employee* and lineal descendants of the Employee who have not attained age 19 before the close of the year. If, as a result of the application of such rules, the adjusted dollar limitation of Code Section 401(a)(17) applicable to family members is exceeded, then such limitation shall be prorated among the affected individuals in proportion to each such individual's Pensionable Earnings as determined under this Section prior to the application of the limitation.

1.35 "Permanent Disability" or "Permanently Disabled" means any physical or mental condition that is certified by a physician selected by the Employer as being a total and permanent disability rendering the person unable to perform any job within the Employer which such person is, in the Employer's sole discretion, reasonably suited to perform

by education or experience. Alcoholism or drug addiction shall not be or be deemed to be a physical disability under the Plan but the mental or physical condition resulting from any such addiction may qualify if duly certified.

1.36 "Permanent Shutdown" means the total and permanent closing of a major steel making, manufacturing or fabrication facility of the Company or other Employing Company or a significant department of such facility which involves the Layoff or termination of employment of a significant number of Employees, determined without regard to whether or not such action is a Permanent Shutdown within the meaning of any basic labor agreement; or, when expressly provided in a basic labor agreement, the permanent closing of a plant, department or division which is agreed to be a Permanent Shutdown (or which is otherwise found under the applicable claims procedure to be a Permanent Shutdown, provided that such finding shall apply only with respect to the Employees covered by such basic labor agreement).

Except as may otherwise be required by the terms of a basic labor agreement, an Employee (i) whose job is eliminated, (ii) who is displaced from his job by reason of a force reduction, (iii) who refuses a transfer of employment, or (iv) who voluntarily terminates his employment or voluntarily retires after the effective date of a Permanent Shutdown but before his employment is involuntarily terminated by an Employing Company, shall be deemed to have voluntarily terminated employment and not to have lost his employment as a result of a Permanent Shutdown for an purposes under the Plan including,

but not limited to, eligibility for a pension under Sections 4.5 and 4.6.

Except as expressly agreed with respect to Employees covered under a basic labor agreement or as established by the Board of Directors or BPAC, neither the sale or transfer of a business, the closing of all or any part of a business following its sale or transfer, nor the outsourcing of all or a substantial part of the work performed by a department or staff function, shall be considered to be a Permanent Shutdown.

1.37 "Plan" means the RAPP. Any reference to the Plan in this plan document shall refer solely to the RAPP except where specific reference is made to the NCPP.

1.38 "Plan Year" means the calendar year.

1.39 "Pre-62 30-Year Annuity" has the meaning set forth in Section 4.3.

1.40 "Preretirement Survivor Annuity" has the meaning set forth in Section 5.1.

1.41 "Qualified Election" has the meanings set forth in Sections 5.2 and 6.5.

1.42 "Qualified Joint and Survivor Annuity" and "Qualified Survivor Annuity" has the meanings set forth in Section 5.2 and Section 6.5.

1.43 "RAPP" means the Armco Inc. Retirement Accumulation Pension Plan, which is a ash balance benefit formula plan constituting part of the NCPP, the terms of which are set forth in this plan document. Any reference in this plan document to the RAPP shall not include any reference to the NCPP except where specific reference is made to the NCPP.

1.44 "RAPP Benefit" means a lump sum payment or a series of monthly payments which are payable to a person who is entitled to receive benefits under the RAPP.

1.45 "Retirement" or "Retire" means and shall be considered to occur.

(a) in the case of a Participant who applies for a RAPP Benefit prior to incurring a Break in Continuous Service, on the date he wishes to retire which shall be a date on or after the latest of:

(1) the date of his request for retirement;

(2) the date of his attainment of eligibility for a RAPP Benefit; or

(3) the last day for which he received Pensionable Earnings from an Employing Company, but not later, than the last day of his Continuous Service; or

(b) in the case of a Participant who applies for a RAPP Benefit after incurring a Break in Continuous Service, on the later of (i) the last day of his Continuous Service, or (ii) the day he becomes eligible for a RAPP Benefit.

1.46 "Spouse" or "Surviving Spouse" means the spouse or surviving spouse of a Participant. To the extent provided under a qualified domestic relations order as defined in Code Section 414(p), the term shall include a former spouse.

1.47 "Spousal Consent" has the meanings set forth in Section 5.2 and Section 6.5.

1.48 "Trust" means the Armco Master Pension Trust, as amended from time to time, or such other one or more trusts, or any successor trust or trusts established by the Company under which any assets of the NCPP or income thereon may be held, invested or reinvested to effectuate the purposes of the NCPP.

1.49 "Year of Eligibility Service" has the meaning set forth in Section 2.4.

* * *

ARTICLE III

ACCOUNTS AND CREDITS TO ACCOUNTS

3.1 *Opening Accounts*

A Participant who participated in the NCPP immediately prior to January 1, 1995 shall have an Opening Account, in addition to a Future Account established under Section 3.2. Such Participant's Opening Account as of January 1, 1995 shall be determined as follows: the Participant's Adjusted Accrued Benefit as of December 31, 1994 under the NCPP shall be multiplied by 115 to create a lump sum value at age 62. Such value shall then be discounted from age 62 for each year and part thereof that the Participant's age at January 1, 1995 precedes the Participant's 62nd birthday, on the basis of an interest rate assumption of 7.5%. If a Participant is older than age 62 on January 1, 1995, the Adjusted Accrued Benefit as of December 31, 1994 under the NCPP shall be multiplied by the factors set forth on Exhibit 2 to create a lump sum value.

A Participant's Adjusted Accrued Benefit is the greater of (i) the frozen accrued benefit under the NCPP as of December 31, 1994 with earnings limited to $150,000 for 1994 and all prior years or (ii) the sum of (1) the accrued benefit under the NCPP as of December 31, 1993 frozen in accordance with Treas. Reg. Section 1.401(a)(4)-13 and (2) the accrued benefit under the NCPP from January 1, 1994 through December 31, 1994 with earnings limited to $150,000.

3.2 *Future Accounts*

As of the last day of each calendar quarter beginning on and after January 1, 1995, there shall be credited to each Participant's Future Account an amount, based on the Participant's attained age and Continuous Service (as determined under Articles 9 and 10 of the NCPP) as of December 31, 1994 equal to his Pensionable Earnings multiplied by the following applicable percentage:

Age at 12/31/94	*Continuous Service as of 12/31/94*					
	0-4	5-9	10-14	15-19	20-24	25+
Under 40	2%	3%	4%	5%	6%	N/A
40-49	3%	4%	5%	6%	7%	8%
50+	4%	5%	6%	7%	8%	9%

The applicable percentage for Participants who were participants in the 2% Defined Contribution Pension Plan as defined in Section 2.1 as of December 31, 1994 or who were hired after December 31, 1994 shall be 2%.

3.3 *Interest Credits To Accounts*

The Accounts off each Participant shall be increased by the pro-rated portion of the Interest Credit Percentage for the applicable calendar year times the Participant's Future Account and the Opening Account (if applicable). Such crediting shall take place as of (i) the end of each calendar quarter

after December 31, 1994 on the balance at the beginning of the quarter and (ii) the Benefit Commencement Date.

Interest credits on Future Accounts shall cease on a Participant's Benefit Commencement Date. Interest credits on Opening Accounts shall cease at the earlier of the participant's attainment of age 65 or Benefit Commencement Date.

Subject to the minimum and maximum percentages, the Interest Credit Percentage for each calendar year shall be equal to the rate, on the November 30 of the prior calendar year, on Treasury Constant Maturities, 5-year, as published in the Federal Reserve Statistical Release H.15(519) of the Board of Governors of the Federal Reserve System. In no event shall the Interest Credit Percentage for Future Accounts be less than 3% or greater than 12.5%. In no event shall the Interest Credit Percentage for Opening Accounts be less than 7.5% or greater than 12.5%.

ARTICLE IV

RAPP BENEFITS

4.1 *Normal Retirement Benefit*

Subject to the minimum protected benefits described in Section 4.8, a Participant may Retire on or after his Normal Retirement Date and receive a RAPP Benefit payable in accordance with Article VI in one of the following payment options:

(a) Full lump-sum payable on his Benefit-Commencement Date equal to his Accounts;

(b) Full annuity beginning on his Benefit Commencement Date equal to the Actuarial Equivalent of his Accounts; or

(c) Partial lump-sum and partial annuity payable or beginning on his Benefit Commencement Date equal to the respective pro-rata amounts determined under (a) and (b) above.

4.2 *Early Retirement Benefit*

A Participant who has not attained age 65 may Retire on or after attainment of age 55 and after completion of at least 15 years of Continuous Service and receive a RAPP Benefit payable in any of the payment options described in Section 4.1.

4.3 *30-Year Retirement*

(a) A Participant who was a Participant in the NCPP prior to December 31, 1994 and who has not attained age 62 may retire on or after completion of 30 years of Continuous Service and receive a Pre-62 30-Year An-

nuity which is the Actuarial Equivalent of the Regular 1.1/1.2% Pension accrued under the NCPP as of December 31, 1994. Such benefit is payable as of the first full calendar month of Retirement and is payable in addition to any Early Retirement Benefit described in Section 4.2 and without regard to election of any payment option described in Section 4.1 for RAPP Benefits and shall cease on the date the Participant attains age 62.

(b) In the event of the Participant's death prior to age 62, the following benefits will be paid to the Participant's Beneficiary commencing with the first full calendar month following the Participant's death and ceasing when the Participant would have attained age 62:

(1) if the Participant died prior to Retirement, 50% of the Pre-62 30-Year Annuity; or

(2) if the Participant died after Retirement, 100% of the Pre-62 30-Year Annuity.

* * *

ARTICLE X

PLAN ADMINISTRATION

10.1 *Powers of the Benefit Plans Administrative Committee*

BPAC is a named fiduciary of the Plan with the general responsibility, full discretionary authority and the power to administer and construe the provisions of the Plan, to determine in its discretion any questions of law or fact arising under the Plan, to determine in its discretion the amount of and to authorize the payment of benefits properly due under the Plan, to maintain Plan records, to, adopt amendments to the Plan in accordance with Section 11.1 and to exercise such other rights and powers as may be specifically granted to herein or by the Board of Directors. The foregoing grant of authority is in addition to, and not in limitation of, the powers granted to BPAC by the Board of Directors in its delegation of authority creating BPAC.

* * *

EXHIBIT 1

ACTUARIAL EQUIVALENCE FACTORS FOR THE RETIREMENT ACCUMULATION PENSION PLAN

A. Factors for Converting an Account into a Life Annuity Benefit

The interest factor used in converting a Future Account into an annual life annuity shall be the 12-month average, rounded to the nearest 0.25%, using the 12/31/z-2 through 11/30/z-1 rates preceding the year of the conversion (z) on 10-year Treasury Bonds, as published in the Federal Reserve Bulletin. The interest factor used in converting an Opening Account into an annual life annuity shall be 7-1/2%. The mortality table shall be the 1971 Group Annuity Mortality Table, for males, projected to 1978, with scale E.

B. Factors for Converting the Life Annuity Benefit Payable to the Participant into an Actuarial Equivalent Benefit under Other Forms of Payment under the Plan

1. Conversion factor for a spouse beneficiary joint and survivor option under Section 6.5(b):

The conversion factor for a 50% survivor benefit shall be .95, reduced by 1/2% for each year in excess of five that the beneficiary is younger than the Participant, or increased by 1/2% for each year in excess of five that the beneficiary is older than the Participant, up to 100% measured on the basis of age on the Benefit Commencement Date.

2. Conversion factor for a co-pensioner option under Section 6.6(b):

The conversion factor for a 50% survivor benefit shall be .95, reduced by 1/2% for each year in excess of five that the beneficiary is younger than the Participant, or increased by 1/2% for each year in excess of five that the beneficiary is older than the Participant, up to 100% measured on the basis of age on the Benefit Commencement Date.

The conversion factor for a 100% survivor benefit shall be .85, reduced by 1% for each year in excess of five that the beneficiary is younger than the Participant, or increased by 1% for each year in excess of five that the beneficiary is older than the Participant, up to 100% measured on the basis of age on the Benefit Commencement Date.

3. Conversion factor for a full cash refund annuity under Section 6.6(a):

The conversion factor shall be 0.95.

C. Assumptions for Other Calculations, including Minimum Protected Benefits

Actuarial Equivalent calculations under the Plan shall use the Applicable Interest Rate and the Applicable Mortality Table. These assumptions shall not be used with respect to lump-sum distributions of a Participant's Account balance.

For purposes of this Exhibit, the "Applicable Mortality Table" is the mortality table based on the prevailing commissioners' standard table (described in Code Section 807(d)(5)(A)) used to determine reserves for group annuity contracts issued on the date as of which present value is determined (without re-

gard to any other subparagraph of Code Section 807(d)(5)), that is prescribed by the Commissioner of the Internal Revenue Service in revenue rulings, notices, or other guidance, published in the Internal Revenue Bulletin.

For purposes of this Exhibit, the "Applicable Interest Rate" for any distribution is the annual interest rate on 30-year Treasury securities as specified by the Commissioner of the Internal Revenue Service in revenue rulings, notices or other guidance, published in the Internal Revenue Bulletin, for the November immediately preceding the calendar year in which the annuity starting date occurs (resulting in a one year stability period).

* * *

Supreme Court, U.S.
FILED
DEC 2 0 2007
OFFICE OF THE CLERK

No. 07-663

In The
Supreme Court of the United States

AK STEEL CORPORATION RETIREMENT ACCUMULATION PENSION PLAN AND AK STEEL CORPORATION BENEFIT PLANS ADMINISTRATIVE COMMITTEE,

Petitioners,

v.

JOHN D. WEST, INDIVIDUALLY AND ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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RESPONSE TO PETITIONER'S STATEMENT OF THE CASE AND OF THE ISSUES

Respondents respectfully submit that AK Steel has not accurately stated the facts, the issues decided below, and the lower courts' conclusions on those issues.

AK Steel repeatedly asserts that this case involves a claim for "statutory violation of ERISA," and not a claim for benefits due under the terms of the AK Steel Pension Plan. *See* Petition at 1, 7, 10. AK Steel thus mischaracterizes the decision below as holding that "a pension plan participant may seek relief for a statutory violation of ERISA under ERISA § 502(a)(1)(B)[, 29 U.S.C. § 1132(a)(1)(B)]." Petition at Questions Presented. On these assertions, AK Steel builds its argument that the Sixth Circuit's opinion in this case is in conflict with decisions of other circuits on the scope of ERISA § 502(a)(1)(B). But the assertions are false. To the Sixth Circuit, the "key issue" was "whether West was paid less than the full accrued benefit due him under the AK Steel Plan." *West v. AK Steel Corp. Retirement Accumulation Pension Plan*, 484 F.3d 395, 405 (6th Cir. 2007), *rehearing en banc denied*, No. 06-3442, 2007 U.S. App. LEXIS 20447 (6th Cir. Aug. 8, 2007) [Petitioner's Appendix at 17a].

AK Steel further asserts that its plan administrator had a "reasonable interpretation" of the Plan's "accrued benefit" provision, *see* Petition at 22, and characterizes the Sixth Circuit's decision as holding that "a court may apply the rule of *contra proferentem* to override a plan administrator's reasonable

interpretation." Petition at Questions Presented. These assertions are the premise for AK Steel's argument that this case presents a "circuit split" on the use of contra proferentum in interpreting ERISA plans. In fact, the plan administrator testified he had never considered the "accrued benefit" definition for any purpose, and didn't even know why it was in the Plan:

> Q. ... Do you know of any purpose that this Section 1.2 accrued benefit definition is actually used for by the plan?
>
> A. I don't – I don't even see it mentioned in the rest of the plan. The only reason I can guess at is that there is some statutory reason, some type of testing that's done within the framework of the IRS that requires this definition to be defined. But in administration of the plan, we don't turn to this definition for any reason.

Deposition of Richard Ford, AK Steel's Corporate Manager of Benefits, at 83, C.A. App. 170.

Other inaccurate statements in AK Steel's Petition are addressed in the Argument below.

ARGUMENT

This is an action brought by plan participants to recover benefits due under the terms of the AK Steel Pension Plan. The retirees received lump-sum distributions of their pension benefits between 1995 and 2005. The chief judge of the district court, and a

unanimous panel of the Sixth Circuit, found the distributions were less than the retirees' "accrued benefit" as defined in the Plan, and ordered relief in the amount of the underpayments. Petitioner's Appendix at 1a–33a and 36a–71a. On AK Steel's motion for rehearing *en banc*, no appellate judge voted to grant rehearing. Petitioner's Appendix at 34a-35a.

The Sixth Circuit's decision is in accord with the decisions of this Court and of the other circuits. There are no conflicts, nor any other reason for review by this Court.

I. THE DECISION BELOW INVOLVED A CLAIM FOR BENEFITS DUE UNDER THE PLAN

This case does not involve a claim for "statutory violation of ERISA," as AK Steel contends. *See* Petition at 1. Rather, as the district court and the Sixth Circuit both found, this case involves a claim for benefits due under the terms of the AK Steel Plan—specifically, the "accrued benefit" defined in Section 1.2 of the Plan. *See* Petitioners' Appendix at 76a. The decision below—finding that the benefits paid were less than the retirees' Plan-defined "accrued benefit"—was based on core principles of ERISA recognized by this Court, and uniformly applied by the circuit courts.

A. ERISA Protects the "Accrued Benefit" Defined by the Plan

As this Court discussed in *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004), "[n]othing in ERISA requires employers to establish employee

benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan. ERISA does, however, seek to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits .... [W]hen Congress enacted ERISA, it 'wanted to ... mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it.'" *Heinz*, 541 U.S. at 743 (quoting *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980))).

ERISA permits a defined benefit plan, such as the AK Steel Plan, to define the "accrued benefit"[1] employees will receive, but then requires the plan to pay the full value of that benefit at retirement. Thus, ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A), "rather circularly defines 'accrued benefit' as 'the individual's accrued benefit determined under the plan,'" *Heinz*, 541 U.S. at 744, while ERISA § 203(a)(2)(A), 29 U.S.C.

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[1] Technically two terms come into play, the "normal benefit" and the "accrued benefit." The "normal benefit" is "the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age [i.e., 65]." ERISA § 3(22), 29 U.S.C. § 1002(22). The "accrued benefit" is defined in terms of the "normal benefit." It is "the portion of the normal retirement benefit which the participant has earned at any point while participating in a defined benefit plan." *Berger v. Xerox Ret. Income Guar. Plan*, 157 F. Supp. 2d 998, 1006 (S.D. Ill. 2001), *aff'd sub nom. Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755 (7th Cir. 2003) (citing ERISA §§ 3(23)(A), 3(35), 29 U.S.C. § 1002(23)(A), (35)).

§ 1053(a)(2)(A), requires that the "accrued benefit" be "nonforfeitable" so "an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions." In *Heinz*, this Court held that the nonforfeitability requirement of ERISA § 203(a) is "a global directive that regulates the substantive content of pension plans; it adds a mandatory term to all retirement packages that a company might offer." *Heinz*, 541 U.S. at 750.

B. Benefits Paid in the Lump Sum Form Must Be Actuarially Equivalent to the Plan's "Accrued Benefit"

The "accrued benefit" in a defined benefit plan means "the individual's accrued benefit determined under the plan and, except as provided in section 204(c)(3), expressed in the form of an annual benefit [i.e., an annuity] commencing at normal retirement age [i.e., age 65]." ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A). *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999) (the "accrued benefit" "[ordinarily is] expressed in the form of an annual benefit commencing at normal retirement age") (quoting ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A)).

Section 204(c)(3), in turn, provides that "if an employee's accrued benefit is to be determined as an amount *other than* an annual benefit commencing at normal retirement age, ... [then] the employee's accrued benefit ... *shall be the actuarial equivalent*" of the annuity commencing at normal retirement age.

ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3) (emphasis added).[2]

In *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000), *cert. dism'd*, 531 U.S. 1061 (2001), the Second Circuit explained this statutory mechanism for protecting the value of participants' accrued benefits:

> What these provisions mean in less technical language is that: (1) the accrued benefit under a defined benefit plan must be valued in terms of the annuity that it will yield at normal retirement age; and (2) if the benefit is paid at any other time (*e.g.*, on termination rather than retirement) or in any other form (*e.g.*, a lump sum distribution, instead of annuity) it must be worth at least as much as that annuity.

Esden, 229 F.3d at 163. *Accord*, *Costantino v. TRW, Inc.*, 13 F.3d 969, 977-80 (6th Cir. 1994); *Lyons v. Georgia Pacific Corp. Salaried Employees Retirement Plan*, 221 F.3d 1235, 1242-52 (11th Cir. 2000), *cert. denied*, 532 U.S. 967 (2001); *Rybarczyk v. TRW Inc.*, 235 F.3d 975, 978-84 (6th Cir. 2001); *Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755, 769-62 (7th Cir. 2003). *See Stephens v. Retirement Income Plan for Pilots of U.S. Air, Inc.*, 464 F.3d 606, 614 (6th Cir. 2006); *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 640 (7th Cir. 2006), *cert. denied*, __ U.S. __, 127 S. Ct. 1143 (2007); *Miller v. Xerox Corp. Retirement Income Guarantee Plan*, 464

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[2] These rules are mirrored in parallel provisions of the Internal Revenue Code, I.R.C. § 411(a)(7) and § 411(c)(3).

F.3d 871, 874-76 (9th Cir. 2006), *cert. denied sub. nom. Xerox Corp. Retirement Income Guarantee Plan v. Miller*, __ U.S. __, 127 S. Ct. 1829 (2007).

C. Cash Balance Plans Must Comply With the Actuarial Equivalence and Nonforfeiture Requirements

A "cash balance plan" is a defined benefit plan[3] in which the pension benefit is calculated in reference to a hypothetical "account balance" that increases over time as a result of employer contributions and interest credits at a rate specified by the plan. *West v. AK Steel Corp. Retirement Accumulation Pension Plan*, 484 F.3d 395, 399 (6th Cir. 2007), *rehearing en banc denied*, No. 06-3442, 2007 U.S. App. LEXIS 20447 (6th Cir. Aug. 8, 2007) [Petitioner's Appendix at 3a–4a].

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[3] *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999). Discussing "the difference between defined contribution plans and defined benefit plans," the Court observed that "[a] defined benefit plan ... consists of a general pool of assets rather than individual dedicated accounts.'" *Hughes Aircraft*, 525 U.S. at 439 (quoting *Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 154 (1993)). Thus, "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool. Instead, members have a right to a certain defined level of benefits, known as 'accrued benefits.'" *Id.* The AK Steel Plan is a pension plan in which "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool." The Plan expressly provides that participants' accounts are hypothetical and do not create property rights to certain funds or assets. Plan § 1.1. *See* Petitioners' Appendix at 75a–76a.

Because they are defined benefit plans, cash balance plans' "accrued benefit" is never the account balance as such, but rather the annuity commencing at age 65 to which the participant is entitled under the plan. Any lump sum distribution must be the actuarial equivalent of that "accrued benefit." *West*, 484 F.3d at 407-08 (citing *Esden*, 229 F.3d at 163; *Berger*, 338 F.3d at 757-58; ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3)) [Petitioners' Appendix at 22a–24a].

In 1996, the Internal Revenue Service instructed cash balance plans that they must use a two-step process in issuing lump sum distributions, first determining the annuity payable at age 65 to which the participant is entitled under the plan, and then calculating the actuarial equivalent of that annuity in current dollars. Thus, "the balance of the employee's hypothetical account must be projected to normal retirement age [and converted into an annuity] and then the employee must be paid at least the present value" of that projected age-65 annuity. Notice 96-8, 1996-1 C.B. at 360 (Part III. A), *quoted in Esden*, 229 F.3d at 166-67.

To satisfy the actuarial equivalence requirement and avoid forfeitures of plan benefits, the "projection-forward" step must take into account the interest credits on the participant's account to age 65, using the plan's stated interest credit rate. The reason can be illustrated in practical terms. A participant retires at age 55 with $50,000 in her hypothetical account. The annuity to which she is entitled commencing at age 65 is calculated, not from her $50,000 current balance, but rather from the much larger balance she

will have at age 65, after an additional 10 years of interest has accrued at the interest credit rate specified in the plan. If the plan provides participants with a favorable interest credit rate (AK Steel's plan provides a minimum of 7.5% per year on participants' Opening Accounts), then the age-65 annuity that is her "accrued benefit" is more valuable in current dollars than simply the current balance of her account. *Esden*, 229 F.3d at 159 ("If the plan's projection rate exceeds the statutory discount rate, then the present value of the accrued benefit will exceed the participant's account balance").

Notice 96-8 requires that this value be taken into account. "[I]n determining the amount of an employee's accrued benefit, a forfeiture, within the meaning of [Treas. Reg. §] 1.411(a)-4T, will result if the value of future interest credits is projected using a rate that understates the value of those credits or if the plan by its terms reduces the interest rate or rate of return used for projecting future interest credits." Notice 96-8, 1996-1 C.B. at 360 (Part III. A), *quoted in Esden*, 229 F.3d at 166-67. A more recent IRS notice, issued after the enactment of the Pension Protection Act of 2006, reaffirms the authority of Notice 96-8 for pre-Act distributions, and reiterates the IRS's admonition against forfeiture. Notice 2007-6, Part II, Para. 12 (I.R.B. 2007-3).

Every circuit to have considered the question has ruled that making retirees forgo interest credits to receive lump sum distributions violates the actuarial equivalence and nonforfeitability requirements:

> Xerox tells its employees who leave the company before they reach [normal retirement age] that if they leave their money with the company they will obtain a pension beginning at age 65 that will reflect future interest credits. They are offered the alternative of taking a lump sum now in lieu of a pension later, but the lump sum is not the prescribed actuarial equivalent of the pension that they are invited to surrender by accepting the lump sum because it excludes those credits.

Berger, 338 F.3d at 761-762. *Accord*, *Esden*, 229 F.2d at 167; *Miller*, 464 F.3d at 874-76.

D. The Courts Below Found That AK Steel's Retirees Did Not Receive the "Accrued Benefit" Defined in the Plan

The court of appeals found that this case is "indistinguishable from *Esden* and *Berger*" because the Plan failed to pay the "accrued benefit" defined in Section 1.2 of the Plan. *West*, 484 F.3d at 409 [Petitioner's Appendix at 26a]. Section 1.2 defines the "accrued benefit" as the "single life annuity commencing on a Participant's Normal Retirement Date ... that is the Actuarial Equivalent of the Participant's current Account," and provides that "the Account is projected to Normal Retirement Date and converted to a single life annuity." *See* Petitioners' Appendix at 76a. If performed in accordance with ERISA, these required calculations would have taken into account the interest credits to age 65, which the Plan sets at a minimum 7.5% per year on participants' Opening Accounts. *West*, 484 F.3d at 399, 400

[Petitioners' Appendix at 4a, 7a]. However, AK Steel failed to make any of the required calculations. Instead, pursuant to Section 4.1 of the Plan, a participant who elected a lump sum distribution received an amount "equal to his Accounts." *West*, 484 F.3d at 409 (citing Section 4.1 of the Plan) [Petitioners' Appendix at 26a]. Thus, the lump sum distributions were not actuarially equivalent to the participants' "accrued benefit," and the retirees forfeited the value of their interest credit rights under the Plan in order to receive the distributions. The Sixth Circuit found that:

> What happened here is exactly what happened in *Berger*—West was required to "sell" his pension entitlement back to AK Steel at a discount in order to receive his lump-sum payout.

West, 484 F.3d at 409 (citing *Berger*, 338 F.3d at 762) [Petitioners' Appendix at 26a–27a].[4]

Stating that "we agree with the analysis of our sister circuits and with that of the district court below," the Sixth Circuit concluded that:

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[4] AK Steel now contends that its plan administrator had a "reasonable interpretation" of Section 1.2, but the plan administrator admitted he had never considered the Plan's "accrued benefit" definition for any purpose, and didn't know why it was there. Deposition of Richard Ford, AK Steel's Corporate Manager of Benefits, at 83, C.A. App. 170 ("in administration of the plan, we don't turn to this definition for any reason").

> "Any distribution in optional form (such as a lump sum) must be no less than the actuarial equivalent of [the normal retirement] benefit." *Esden*, 229 F.3d at 159. And as discussed above, the normal retirement benefit [under the AK Steel Plan] is "a single-life annuity payable at normal retirement age." *Id.*; *see also* AK Steel Plan § 1.2. AK Steel's complicated interpretations of the relevant statutes and regulations do not, in our view, refute these basic legal principles.

West, 484 F.3d at 409 [Petitioners' Appendix at 27a].

II. NO CONFLICT IS PRESENTED ON THE SCOPE OF ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)

AK Steel contends that the Sixth Circuit's opinion is in conflict with other decisions involving the scope of one of ERISA's enforcement sections, ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). This alleged conflict is premised on AK Steel's mischaracterization of this case as involving a "statutory violation of ERISA." *See* Petition at 1. In fact, the courts below properly found that this case involves a claim for "benefits due under the plan," actionable under § 502(a)(1)(B). That finding is in accord with decisions of this Court, and no conflict is presented.

A. The Decision Below Is in Accord With Holdings of This Court on the Scope of ERISA § 502(a)(1)(B)

To the Sixth Circuit, the "key issue" was "whether West was paid less than the full accrued benefit due him under the AK Steel Plan." *West*, 484 F.3d at 405 [Petitioners' Appendix at 17a]. The court of appeals answered that question in the negative, affirming the finding of the district court that the retirees' lump sum distributions did not equal the "accrued benefit" defined in Section 1.2 of the Plan.

It necessarily followed that AK Steel's failure to distribute the "accrued benefit" defined in the Plan was actionable under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). *See West*, 484 F.3d at 404–05 [Petitioners' Appendix at 14a–18a]. Indeed, § 502(a)(1)(B) expressly authorizes such a claim, stating that a plan participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

AK Steel relies on Section 4.1 of the Plan, which provides that a retiree who elects the lump sum form of payment will receive only an amount "equal to his Account" (instead of the full "accrued benefit" defined in Section 1.2 of the Plan). *See* Petitioners' Appendix at 90a. Section 4.1 violates the core principle of ERISA that a lump sum distribution of pension benefits must equal the participant's "accrued benefit" as defined in the plan—a requirement "repeatedly recognized by courts." *Esden*, 229 F.3d at 162–65. Yet AK Steel

contends that, *because of* the illegal provision in Section 4.1, this case cannot proceed as a claim for "benefits due under the plan" pursuant to ERISA § 502(a)(1)(B). Of course, if that were true, any plan could deprive its participants of § 502(a)(1)(B)'s remedy for "benefits due" simply by stating that the plan's "accrued benefit" will not be paid.

In both the district court and the Sixth Circuit, "AK Steel argue[d] that *neither* prong of the ERISA enforcement scheme authorizes the relief that the plaintiffs seek," *West*, 484 F.3d at 402–03 [Petitioners' Appendix at 12a] (referring to § 502(a)(1)(B) and § 502(a)(3), the latter of which allows participants to bring a civil action "to enjoin any act or practice which violates" ERISA or "obtain other appropriate equitable relief") (emphasis added). AK Steel has now abandoned that position, allowing that there was "a potential avenue of relief." Petition at 18 n.7. According to AK Steel, the retirees "could have (1) sought an equitable reformation of the Plan under § 502(a)(3) to conform the Plan to the provisions of ERISA, and then (2) invoked § 502(a)(1)(B) to seek benefits due under the terms of the Plan as reformed." *Id.*

In the instant case, the retirees pleaded their claim under both § 502(a)(1)(B) and § 502(a)(3). *West*, 484 F.3d at 403 [Petitioners' Appendix at 11a] ("West's complaint tracks the language of both § 502(a)(1)(B) and § 502(a)(3)"). The district court considered both sections but found the retirees' claim for benefits could be determined under § 502(a)(1)(B)–a conclusion affirmed by the court of appeals. Order dated November 22, 2004 [Petitioner's Appendix at 65a-66a],

aff'd, *West*, 484 F.3d at 405 [Petitioner's Appendix at 17a].

The Sixth Circuit's holding that "§ 502(a)(1)(B) provides an appropriate remedy," *id.* [Petitioner's Appendix at 17a], is in accordance with this Court's opinion in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). In *Knudson*, this Court emphasized that, while plan *fiduciaries* are limited to certain equitable remedies under § 502(a)(3), "Congress authorized 'a participant or beneficiary' to bring a civil action 'to enforce his rights under the terms of the plan' [pursuant to § 502(a)(1)(B)], *without reference to whether the relief sought is legal or equitable*." *Id.* at 221 (emphasis added).

Section 502(a)(1)(B), the Court has observed, "specifically provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims, ... one that runs directly to the injured beneficiary." *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996). Those breaches of duty are not limited to violations of plan terms, as AK Steel contends, but include the requirements imposed on plans by ERISA. ERISA's fiduciary duty section, § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), expressly subordinates plan provisions to ERISA's requirements, providing that the plan administrator "shall discharge his duties with respect to a plan ... in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of this title and title IV*."

The "accrued benefit" protected by ERISA is always "determined under the plan." ERISA § 3(23)(A), 29

U.S.C. § 1002(23)(A), *discussed in Heinz*, 541 U.S. at 744. Because "ERISA [does not] mandate what kind of benefits employers must provide," *Heinz*, 541 U.S. at 743, "[o]nly the words of the Plan itself can create an entitlement to benefits." *Hein v. Federal Deposit Insurance Corp.*, 88 F.3d 210, 215 (3d Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997). Once a plan defines its "accrued benefit," however, ERISA prescribes regulatory requirements "to protect contractually defined benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989). One such protection is ERISA § 203(a)(2)(A), 29 U.S.C. § 1053(a)(2)(A), which requires that the "accrued benefit" defined by the plan be "nonforfeitable." This statutory requirement "adds a mandatory term to all retirement packages that a company might offer." *Heinz*, 541 U.S. at 750. *Accord*, *Page v. Pension Ben. Guaranty Corp.*, 968 F.2d 1310, 1314 (D.C. Cir. 1992) (opinion by Ginsburg, J.) (minimum vesting standards established by ERISA must either be immediately adopted by pension plans or become "implied 'terms of the plan'" for purposes of ERISA's nonforfeitability provision) (quoting *Rettig v. Pension Ben. Guaranty Corp.*, 744 F.2d 133, 143 (D.C. Cir. 1984)); *May Dept. Stores Co. v. Federal Insurance Co.*, 305 F.3d 597, 602 (7th Cir. 2002) (ERISA's statutory requirements constitute terms of the plan implied by law).

Thus, under decisions of this Court, a claim for the "accrued benefit" defined in a plan, calculated in accordance with the requirements of ERISA, is a claim for "benefits due under the terms of the plan" within the scope of ERISA § 502(a)(1)(B). The decision below faithfully adheres to this Court's holdings.

B. The Decision Below Does Not Conflict With Decisions of Other Circuits

The decision below is not in conflict with decisions of other circuits. The Eighth Circuit case of *Ross v. Rail Car America Group Disability Income Plan*, 285 F.3d 735 (8th Cir. 2002), *cert. denied sub nom. Ross v. Rail Car America, Inc.*, 537 U.S. 885 (2002), did not involve a claim for benefits due under the terms of the plan or the requirements of ERISA. Indeed, the plan itself, which "is ordinarily liable for benefits payable under the terms of the plan and is thus the primary defendant in a section 502(a)(1)B) action," was "merely a nominal defendant." *Ross*, 285 F.3d at 740 (internal quotation marks omitted). The case actually involved an employee's attempt to set aside two amendments of the plan that "shortened the duration of his benefits" and "reduced the amount of his monthly payment,"on the ground that the amendments were not signed by the plan administrator. The Eighth Circuit affirmed the grant of summary judgment against the employee "because the 1990 and 1991 amendments were validly enacted." *Ross*, 285 F.3d at 743.

The First Circuit case of *Todisco v. Verizon Communications, Inc.*, 497 F.3d 95 (1st Cir. 2007), was not a claim for benefits at all. Rather, the plaintiff, a widowed spouse, sought "compensatory monetary damages, because of Verizon's failure to honor the oral representation it made to her husband that he did not need to submit a statement of current health in order to obtain supplemental life insurance." *Todisco*, 497 F.3d at 100.

In *Carrabba v. Randalls Food Markets, Inc.*, 252 F.3d 721 (5th Cir. 2001), *cert. denied*, 534 U.S. 995 (2001), the Fifth Circuit merely affirmed the district court's decision without opinion. The district court had awarded "underpayments" to plan participants so they would be "placed in basically the same financial position" they would have been in if the plan "had complied with ... the accrual and vesting provisions of ERISA." *Carrabba v. Randalls Food Markets, Inc.*, 145 F. Supp. 2d 763, 770-71 (D. Tex. 2000), *aff'd without opinion*, 252 F.3d 721 (5th Cir. 2001), *cert. denied*, 534 U.S. 995 (2001).

None of these cases conflict with the Sixth Circuit's decision in the instant case, or present a "circuit split" on the scope of ERISA § 502(a)(1)(B).

C. The Decision Below Does Not Conflict With ERISA's Regulatory Scheme

Nor does the decision below conflict with ERISA's "uniform regulatory scheme." Petition at 19 (quoting *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 208 (2004)). AK Steel contends that ERISA provisions cannot be considered in deciding claims for benefits under § 502(a)(1)(B), because then state courts, which have concurrent jurisdiction in such cases, could apply federal law. AK Steel's argument is based solely on a statement in a 1974 Congressional report suggesting that claims for benefits "do not involve application" of ERISA's provisions. Petition at 6. However, that statement "does not mesh with the plain language" of § 502(a)(1)(B), inasmuch as the statute, "[b]y its own terms, ... broadly covers any action to recover, enforce, or clarify benefits, without regard to which ERISA

provisions must be applied during the action." *Board of Trustees of Laborers Pension Trust Fund v. Levingston*, 816 F. Supp. 1496, 1500 (N.D. Cal. 1993). *Accord*, *In Re Marriage of Oddino*, 16 Cal.4th 67, 78, 939 P.2d 1266, 1273 (1997), *cert. denied*, 523 U.S. 1021 (1998) ("Congress did not in ERISA limit state court jurisdiction to actions in which the provisions of title I of ERISA have no application").

Both federal and state courts properly consider ERISA requirements in deciding benefit claims under § 502(a)(1)(B). "[N]othing in the concept of our federal system prevents state courts from enforcing rights created by federal law." *Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 507 (1962). In *Oddino, supra*, the Plan contended that a divorced spouse's claim for benefits would involve "interpretation of ERISA's QDRO provisions" and so could not be decided by a state court pursuant to § 502(a)(1)(B). *Oddino*, 16 Cal.4th at 77, 939 P.2d at 1272. Like AK Steel, the plan argued that "exclusive federal jurisdiction is necessary to allow development of a consistent federal common law of rights and obligations under ERISA-regulated plans." *Id.* at 79–80, 939 P.2d at 1274. Quoting federal authority, the California Supreme Court disagreed: "Congress's choice to vest jurisdiction over one class of ERISA civil actions in both the state and federal courts is in no way inconsistent with its intent to create a comprehensive scheme of federal common law in the area. State as well as federal courts may be expositors of federal law." *Id.* at 80, 939 P.2d at 1274 (quoting *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1500, n.2 (9th Cir. 1983)).

III. NO BONA FIDE ISSUE IS PRESENTED ON THE DOCTRINE OF CONTRA PROFERENTUM

A. Consideration of the Contra Proferentum Doctrine Would Not Affect The Outcome of This Case

The decision below turned on Section 1.2 of the AK Steel Plan, which defined the Plan's "accrued benefit" as "a single life annuity commencing on a Participant's Normal Retirement Date" and triggered ERISA's requirement that "[a]ny distribution in optional form (such as a lump sum) must be no less than the actuarial equivalent" of the Plan's "accrued benefit." *West*, 484 F.3d at 409 (quoting *Esden*, 229 F.3d at 159) (parenthetical phrase by the *Esden* court) [Petitioner's Appendix at 27a]. What remained was to address the lump sum provision in Section 4.1 of the Plan, which said that a participant who elected a lump sum distribution received an amount "equal to his Accounts." *See* Petitioners' Appendix at 90a. As AK Steel concedes in its Petition, this provision "expressly states that lump sum payments shall *not* be calculated as the actuarial equivalent of an employee's age-65 annuity." Petition at 8 (emphasis by AK Steel).

The Sixth Circuit dealt with Section 4.1 by invoking the contra proferentum doctrine: "To the extent that the Plan's language with respect to lump-sum distributions is ambiguous in that it conflicts with the definition of 'accrued benefit' in another section of the Plan, the ambiguity must be resolved in the plaintiffs' favor." *West*, 484 F.3d at 409 [Petitioners' Appendix at 27a]. The court could simply have said that Section

4.1 is void for illegality. But either way, no "reasonable interpretation" by AK Steel could white-wash a plan provision which "expressly states that lump sum payments shall *not* be calculated as the actuarial equivalent of an employee's age-65 annuity" as ERISA requires.[5] Petition at 8 (emphasis by AK Steel). *See West*, 484 F.3d at 409 [Petitioners' Appendix at 26a–27a] ("AK Steel's complicated interpretations of the relevant statutes and regulations do not, in our view, refute these basic legal principles").

No plan administrator has discretion to interpret the terms of the plan in a way that violates the requirements of ERISA. *See, e.g., Janssen v.*

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[5] AK Steel's claim that its plan administrator had a "reasonable interpretation" of the Plan is belied by the evidence. The plan administrator admitted he had never considered the Plan's "accrued benefit" definition for any purpose and didn't even know why it was there:

> Q. ... Do you know of any purpose that this Section 1.2 accrued benefit definition is actually used for by the plan?
>
> A. I don't – I don't even see it mentioned in the rest of the plan. The only reason I can guess at is that there is some statutory reason, some type of testing that's done within the framework of the IRS that requires this definition to be defined. But in administration of the plan, we don't turn to this definition for any reason.

Deposition of Richard Ford, AK Steel's Corporate Manager of Benefits, at 83, C.A. App. 170.

Minneapolis Auto Dealers Benefit Fund, 447 F.3d 1109, 1114 (8th Cir. 2006) (one factor "[t]o determine if a plan administrator's interpretation of a plan is reasonable" is "whether the interpretation conflicts with the substantive or procedural requirements of ERISA") (citing *Finley v. Special Agents Mut. Benefit Ass'n*, 957 F.2d 617, 621 (8th Cir. 1992)); *Fagan v. National Stabilization Agreement of the Sheet Metal Industry Trust Fund*, 60 F.3d 175, 180 (4th Cir. 1995) (one factor in determining reasonableness of administrator's interpretation of plan terms is "whether the challenged interpretation is at odds with the procedural and substantive requirements of ERISA itself") (quoting *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1188 (4th Cir. 1989)); *Cotter v. Eastern Conference of Teamsters Retirement Plan*, 898 F.2d 424, 428 (4th Cir. 1990) (rejecting plan administrator's interpretation of plan terms because "[the administrator's] interpretation of the Plan might lead to forfeiture of vested rights to retirement benefits" in violation of ERISA § 203(a), 29 U.S.C. § 1053(a)). *Cf. Wagener v. SBC Pension Benefit Plan*, 407 F.3d 395, 403 (D.C. Cir. 2005) ("An interpretation of the Plan that rests on impermissible discrimination is clearly unreasonable and, therefore, it fails whether we apply *de novo* review or a deferential standard of review").

Thus, even if the Sixth Circuit's discussion of contra proferentum in reference to Section 4.1 of the Plan were misplaced, it would not affect the conclusion of the court of appeals that plaintiffs' lump sum distributions had to be actuarially equivalent to the "accrued benefit" defined by the Plan in Section 1.2. Indeed, the outcome would not have changed one whit if contra proferentum had never been mentioned.

B. There is No "Circuit Split" on Contra Proferentum

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court held that a denial of benefits claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), "is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," in which case an abuse of discretion standard applies. 489 U.S. at 115. The Court added that, "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Id.* (quoting Restatement (Second) of Trusts § 187, Comment *d* (1959)).

AK Steel contends there is a "circuit split" on the application of *Firestone*'s holdings by the circuit courts, involving the use of the contra proferentum doctrine in abuse of discretion cases. Petition at 23-27. According to AK Steel, four circuits reject any use of contra proferentum in such cases, while two circuits permit the doctrine to be used and two other circuits adopt a hybrid approach. *Id.* Contrary to AK Steel's contention, however, there is no conflict warranting review by this Court.

The hybrid approach of the Fifth Circuit determines "the legally correct interpretation under the doctrine of *contra proferentem*," *Spacek v. Maritime Assoc.*, 134 F.3d 283, 298 (5th Cir. 1998), and if it is not, decides "whether the administrator's decision was

an abuse of discretion." *Spacek*, 184 F.3d at 292, 298 n.14; *Rhorer v. Raytheon Engineers & Constructors, Inc.*, 181 F.3d 634, 642 (5th Cir. 1999). AK Steel contends that this conflicts with decisions like *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999), in which the Tenth Circuit held that "the doctrine of contra proferentem is inapplicable" in abuse of discretion cases. Yet the Tenth Circuit itself saw no such conflict in *Kimber*. Discussing the Fifth Circuit's hybrid approach in *Spacek* and *Rhorer*, the Tenth Circuit found that "[s]ince this approach merely melds contra proferentem into the required discretionary review, we do not view it as conflicting with our decision today." *Kimber*, 196 F. 3d at 1101.

AK Steel further errs when it contends that the Sixth Circuit's use of contra proferentum overrides plan administrator discretion. Sixth Circuit jurisprudence embraces *Firestone*'s requirement of deference. In *Graham v. Western Kentucky Navigation, Inc.*, No. 99-5708, 2000 U.S. App. LEXIS 22250 (6th Cir. Aug. 23, 2000), Circuit Judge R. Guy Cole, Jr., one of the panel members in the instant case, wrote that "[a]n arbitrary and capricious standard of review is 'highly deferential' to the decision of the party making the benefits determination. To meet this standard, the reviewing court need only find that the decision to deny benefits was 'rational in light of the plan's provisions.'" 2000 U.S. App. LEXIS 22250 at *4 (citation omitted) (quoting *Yeager v. Reliance Standard Life Ins. Co.*, 88 F.3d 376, 380 (6th Cir. 1996)).

The Sixth Circuit has never held that contra proferentum can override a reasonable exercise of

administrator discretion. *See Mitchell v. Dialysis Clinic, Inc.*, 18 Fed. Appx. 349, 2001 U.S. App. LEXIS 19439 (6th Cir. Aug. 24, 2001). In *Mitchell*, the plaintiffs cited "cases from this Circuit that they claim have reduced the deference given to an administrator's decision through the use of state principles of contract interpretation," specifically contra proferentum. *Mitchell*, 18 Fed. Appx. at 353. Dissecting the references to contra proferentum in those cases, the Sixth Circuit concluded that "[w]e do not believe that through these statements this Circuit has established a rule of interpretation that would completely contradict the deference paid to an administrator's decision." *Mitchell*, 18 Fed. Appx. at 352-54 (discussing *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 557 n.7 (6th Cir. 1998) (en banc); *University Hospitals of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 846-47 (6th Cir. 2000); *Copeland Oaks v. Haupt*, 209 F.3d 811, 813 (6th Cir. 2000)).

For example, although *Perez* had referred to the contra proferentum doctrine, "that language does not hold that the *Perez* court was suggesting that the rule of interpretation is to be used in ERISA cases when the standard of review is arbitrary and capricious." *Mitchell*, 18 Fed. Appx. at 353. Indeed, *Perez* concluded that "[b]ecause the only reasonable interpretation of the Plan concludes that *it vests discretion* in Aetna to make benefit determinations, Perez's *contra proferentum* argument lacks merit." *Id.* (quoting *Perez*, 150 F.3d at 557 & n.7). Similarly, contra proferentum was mentioned in *University Hospitals* and *Copeland Oaks*, *supra*, but was not dispositive in either case. *See Mitchell*, 18 Fed. Appx. at 354.

Sixth Circuit decisions before and after *Mitchell* have declined to apply contra proferentum where the plan administrator was empowered to interpret plan terms, and instead deferred to administrator discretion. *See Graham v. Western Kentucky Navigation, Inc.*, No. 99-5708, 2000 U.S. App. LEXIS 22250 at *7-8 (6th Cir. Aug. 23, 2000); *Marquette General Hosp. v. Goodman Forest Industries*, 315 F.3d 629, 632-33 (6th Cir. 2003); *Ziegler v. HRB Management, Inc.*, 182 Fed. Appx. 405, 408, 2006 U.S. App. LEXIS 11905 at *9-10 (6th Cir. May 9, 2006). Many other Sixth Circuit decisions defer to administrator discretion without even considering contra proferentum. *Lennon v. Metropolitan Life Ins. Co.*, 504 F.3d 617 (6th Cir. 2007); *Osborne v. Hartford Life and Accident Ins. Co.*, 465 F.3d 296 (6th Cir. 2006), *cert. denied*, __ U.S. __, 128 S. Ct. 46 (2007); *Belluardo v. Cox Enterprises, Inc. Pension Plan*, 157 Fed. Appx. 823, 2005 U.S. App. LEXIS 24975 (6th Cir. Nov. 8, 2005); *Gismondi v. United Technologies Corp.*, 408 F.3d 295 (6th Cir. 2005).

The other circuit on which AK Steel relies for its "circuit split" is the Fourth, but there, too, the cases cited by AK Steel fail to exhibit the alleged conflict. *Carolina Care Plan, Inc. v. McKenzie*, 467 F.3d 383 (4th Cir. 2006), *cert. dismissed*, __ U.S. __, 128 S. Ct. 6 (2007); *McKeldin v. Reliance Standard Life Ins. Co.*, No. 06-1743, 2007 U.S. App. LEXIS 24289 (4th Cir. Oct. 17, 2007). In *Carolina Care Plan*, contra proferentum was only the last of several factors analyzed by the court, and it did not override any other factor. Rather, it was only because the plan administrator's interpretation failed under the factors previously considered by the court that contra

proferentum was even reached. 467 F.3d at 387-89. In *McKeldin*, the court mentioned contra proferentum but never applied it, and ultimately upheld the plan administrator's interpretation as a proper exercise of discretion. 2007 U.S. App. LEXIS 24289 at *8-12.

CONCLUSION

The Sixth Circuit's decision in the instant case is not in conflict with decisions of other circuit courts of appeals, either on the scope of relief afforded by ERISA §§ 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), or on the applicability of contra proferentum in interpreting a pension plan. Therefore, AK Steel's petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

AK STEEL CORPORATION RETIREMENT ACCUMULATION PENSION PLAN AND AK STEEL CORPORATION BENEFIT PLANS ADMINISTRATIVE COMMITTEE

Petitioners,

v.

JOHN D. WEST, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONERS

On May 23, 2008, the United States filed an amicus brief in support of the petition for certiorari in *Amschwand* v. *Spherion Corp.*, No. 07-841. Petitioners submit this Supplemental Brief pursuant to Rule 15.8 of the Rules of this Court because the government's brief in *Amschwand* demonstrates the importance of granting review in this case.

1. In its brief, the United States urges this Court to grant review in *Amschwand* "to eliminate the confusion among the courts of appeals" about the scope of relief available under ERISA § 502(a)(3). U.S. Br. 8. Section 502(a)(3) authorizes federal courts to grant "equitable relief" to redress violations of ERISA or of the terms of an ERISA plan. 29 U.S.C. § 1132(a)(3). Most of the courts of appeals have held that this provision does not allow courts to grant monetary relief for breaches of ERISA by ERISA fiduciaries because such relief is not properly characterized as "equitable." U.S. Br. 15. The Seventh Circuit has reached the opposite conclusion. *Id.* at 16.

The United States argues that the majority view of the courts of appeals is mistaken because a suit against an ERISA fiduciary for monetary relief from a breach of fiduciary duty "is directly analogous to a traditional action by the beneficiary of a trust to compel the trustee to redress a breach of trust." U.S. Br. 10. Such suits, the government argues, "were considered equitable in the days of the divided bench." *Id.* at 11. The government concludes that "this Court should grant review and correct the court of appeals' misinterpretation of Section 502(a)(3) by holding that monetary relief is available against

fiduciaries who breach their ERISA duties." *Id.* at 21.

2. The United States' recommendation to grant review in *Amschwand* underscores the importance of granting review in this case. According to the United States, the courts of appeals have adopted an unduly narrow reading of § 502(a)(3) that often leaves plan participants "without any meaningful remedy" for their injuries. U.S. Br. 7, 18. This is exactly the mistake that led the Sixth Circuit into error in the decision below.

The Sixth Circuit confronted the question of whether Respondent's ERISA claim could be remedied under either of two ERISA provisions – § 502(a)(3) or § 502(a)(1)(B). The court concluded that Respondent could *not* obtain monetary relief under § 502(a)(3) because the requested relief would constitute "legal" relief, not "equitable" relief. *See* Pet. App. 12a-13a. Based on this premise – which the United States rejects in its amicus brief – the court concluded that unless Respondent were afforded a remedy under § 502(a)(1)(B), participants in ERISA plans would have no remedy at all for a broad swath of ERISA violations. *See id.* at 16a (reiterating the district court's "aptly stated" conclusion that if Respondent had no remedy under § 502(a)(1)(B), benefit payments that "'blatantly violate ERISA'" would be immune from challenge). Troubled by the prospect of a broad category of claims without a remedy, the court reached the strained conclusion that Respondent had a remedy under § 502(a)(1)(B). *Id.* at 17a; *see also id.* at 67a.

The United States' brief in *Amschwand* makes clear that the Sixth Circuit was mistaken. Contrary

to the Sixth Circuit's conclusion, relief under § 502(a)(1)(B) is *not* available here because Respondent alleges a violation of ERISA provisions rather than a violation of plan terms. Section 502(a)(1)(B) provides redress only for violations of "the terms of the plan," 29 U.S.C. § 1132(a)(1)(B), not for violations of ERISA provisions, *see* Pet. 13-21.

By contrast, the United States argues that relief *is* available in a case like this one under § 502(a)(3). Respondent sued the plan administrator – an ERISA fiduciary under 29 U.S.C. § 1002(21)(A) – for breach of an ERISA provision that the plan administrator had a fiduciary duty to follow, *see* 29 U.S.C. § 1104(a)(1)(D); *Aetna Health Inc.* v. *Davila*, 524 U.S. 2000, 218 (2004) (holding that a plan administrator's determination of a benefit under ERISA "is generally a fiduciary act"). The United States explains that § 502(a)(3) provides a monetary remedy for such a claim because equity traditionally allowed an "action by the beneficiary of a trust to compel the trustee to redress a breach of trust." U.S. Br. 10; *see also id.* at 21 ("monetary relief is available against fiduciaries who breach their ERISA duties").

Whether relief for a statutory claim like Respondent's is available under § 502(a)(3), as the United States contends, or under § 502(a)(1)(B), as the Sixth Circuit erroneously concluded, is a matter of great practical and precedential importance. First, the Sixth Circuit's interpretation would allow *state courts* to construe ERISA provisions because state courts have jurisdiction over § 502(a)(1)(B) claims. Pet. 19-22. This would frustrate a deliberate Congressional decision to vest federal courts with exclusive jurisdiction over the interpretation of

ERISA. *Id.* The United States' interpretation avoids this problem, since state courts have no jurisdiction over § 502(a)(3) claims. *See* 29 U.S.C. § 1132(e)(1).

Second, as emphasized in the government's brief, the lower courts are in a state of "confusion" about the proper interpretation of ERISA § 502 – confusion that this Court should eliminate by granting review in this case. The Sixth Circuit's unduly *narrow* reading of § 502(a)(3) deepens the circuit split regarding that provision discussed at page 15 of the government's brief. Separately, the Sixth Circuit's unduly *broad* reading of § 502(a)(1)(B) exacerbates the split between the Sixth and Seventh Circuits, on the one hand, and the Fifth Circuit, the Eighth Circuit, and the highest courts of Vermont and Ohio, on the other hand, regarding the interpretation of § 502(a)(1)(B). Pet. 13-19.

Finally, the question of whether § 502(a)(1)(B) or § 502(a)(3) provides the correct remedial path here makes a crucial difference to the outcome of this case. The Sixth Circuit found that Respondent waived any claim for equitable relief under § 502(a)(3) in the proceedings below. *See* Pet. 9-10. Moreover, the standards for granting relief under §§ 502(a)(1)(B) and 502(a)(3) are different, and Respondent has not met the standards imposed by § 502(a)(3).[1]

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[1] Whereas monetary relief under § 502(a)(1)(B) ordinarily flows automatically from a finding of a violation, relief is available under § 502(a)(3) only when an award would be "equitable" and "appropriate," 29 U.S.C. § 1132(a)(3), a showing that Respondent here never made. Pet. 18-19 n. 7; Petitioners' Reply at 8-9 n.2.

CONCLUSION

For the foregoing reasons, as underscored and supported by the United States' brief in *Amschwand*, this Court should grant review in this case. In the alternative, the Court should hold this case pending the disposition of the *Amschwand* petition.

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SUPPLEMENTAL BRIEF OF PETITIONER

This Court should grant review on two issues. First, as the Government acknowledges, the Sixth Circuit's interpretation of ERISA § 502(a)(1)(B) allows *state courts* to enforce ERISA provisions under their § 502(a)(1)(B) jurisdiction. Review of the Sixth Circuit's interpretation of § 502(a)(1)(B) should be granted in order to preserve exclusive *federal* jurisdiction over the enforcement of ERISA provisions and to resolve a split of authority among the lower courts.

Second, review should be granted on the *contra proferentem* issue because the Government acknowledges that the circuits are split on this recurring and important question regarding the interpretation of ERISA plans.

I. The Court Should Review The § 502(a)(1)(B) Issue.

A. The Lower Courts Are Split.

Although the text of § 502(a)(1)(B) refers expressly to actions that seek to enforce "the terms of [a] plan," the Sixth and Seventh Circuits have construed § 502(a)(1)(B) to allow actions that seek the enforcement of *either* plan terms *or* ERISA provisions. Pet. 16-17; U.S. Br. 16. By contrast, other circuits and state supreme courts have held that ERISA provisions cannot be enforced under § 502(a)(1)(B). The Government's efforts to explain away this conflict of authority are unconvincing.

The Government argues that *Ross* v. *Rail Car America Group Disability Income Plan*, 285 F.3d 735 (8th Cir. 2002), does not present a circuit split

because the plaintiff there did not seek "monetary relief representing additional plan benefits." U.S. Br. 17. But Ross *did* seek monetary relief consisting of the "full benefits" that he was allegedly due under his plan. 285 F.3d at 740-41. He argued that he was entitled to additional benefits under the original terms of his plan and that two plan amendments that purported to reduce his benefits violated ERISA. *See id.*

The Eighth Circuit held that Ross could not proceed under § 502(a)(1)(B) because he was not seeking benefits due "under the terms of the plan," but instead sought to "enforce a provision of [ERISA]." *Id.* The Sixth Circuit's holding that a plan participant can enforce ERISA provisions under § 502(a)(1)(B) squarely conflicts with the Eighth Circuit's holding that § 502(a)(1)(B) "does not authorize such a claim." 285 F.3d at 740. *See* Pet. 15-16; Reply Br. 4-5.

The Sixth Circuit's decision also conflicts with *Carrabba* v. *Randalls Food Markets, Inc.*, 252 F.3d 721 (5th Cir. 2001). The Government argues that *Carrabba* "is not the type of decision that gives rise to a circuit conflict" because it merely affirms a district court opinion. U.S. Br. 17. But the Fifth Circuit's published opinion adopts the district court opinion as Fifth Circuit law, finding "no reversible error of fact or law by the district court," and affirming "based on that court's conscientious, well-reasoned opinions, which will be published." 252 F.3d 721. Such published affirmances have

"precedential value." *See* 5th Cir. R. 47.5.3.[1] Moreover, in prior filings with this Court, the Solicitor General has recognized that such published affirmances create a valid circuit split. *See, e.g.*, Reply Br., *United States* v. *Robinson*, No. 03-547, at *4-*5 (Dec. 18, 2003) (arguing that the Sixth Circuit's opinion in *Venture Funding, Ltd.* v. *Commissioner*, 110 T.C. 236, 240 (1998), *aff'd*, 198 F.3d 248 (6th Cir. 1999) (Table), established a cert-worthy circuit split because the decision had precedential value under Sixth Circuit rules).

The district court opinion adopted by the Fifth Circuit in *Carrabba* holds that plan participants who seek additional benefits under the provisions of ERISA cannot proceed "under the authority of [§ 502(a)(1)(B)]," but instead must proceed under § 502(a)(3). *Carrabba* v. *Randalls Food Mkts., Inc.*, 145 F. Supp. 2d 763, 770 (N.D. Tex. 2000). That holding directly conflicts with the Sixth Circuit's decision that ERISA provisions *can* be enforced under § 502(a)(1)(B).

The Government also errs in suggesting that *Ross* and *Carrabba* can be distinguished as cases that merely involved a request for "reformation of the plan." U.S. Br. 17, 18. The *plaintiffs* in those cases came to court asking not for a reformation of the plan, but for additional benefits allegedly due under ERISA provisions. *See Ross*, 285 F.3d at 740-41; *Carrabba*, 145 F. Supp. 2d at 770. The *courts* in those cases responded that no such relief was

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[1] Decisions without precedential value are affirmed in unpublished orders. *See* 5th Cir. R. 47.6.

available under § 502(a)(1)(B), but that the plaintiffs could seek a reformation of the plan under § 502(a)(3) to conform the plan to ERISA.

Similarly, in *Duffy* v. *Brannen*, the Vermont Supreme Court held that a claim for benefits "'under the terms of the plan'" falls within a state court's concurrent jurisdiction under § 502(a)(1)(B), while a claim that "calls for a construction and implementation of standards of conduct established by ERISA" does not. 529 A.2d 643 (Vt. 1987). And, in *Richland Hospital, Inc.* v. *Ralyon*, the Ohio Supreme Court held that while it had jurisdiction over a claim for benefits due under the contractual terms of the plan, "Subsection [502](a)(1)(B) expressly limits the actions cognizable in state courts and only provides for the enforcement of contractual rights as remedies." 516 N.E.2d 1236, 1239-40 (Ohio 1987).

Finally, *Oddino* v. *Oddino* declares that "ERISA title I, sections 1001 through 1145," cannot be enforced under § 502(a)(1)(B). 939 P.2d 1266, 1273 (Cal. 1997). Here, in sharp contrast, the courts below enforced ERISA provisions codified at 29 U.S.C. §§ 1053(e)(2), 1054(c)(3) and 1055(g)(3) under ERISA § 502(a)(1)(B). *See* U.S. Br. 6, 7. The Sixth Circuit decision thus conflicts with all three of these state supreme court decisions.

B. The Sixth Circuit Incorrectly Construed § 502(a)(1)(B).

1. The Government argues that "ERISA plans incorporate the provisions of ERISA" by operation of law. U.S. Br. 12; *see also id.* at 1314 ("the requirements of ERISA are ... incorporated into

ERISA plans."). In the Government's view, this means that ERISA provisions can be treated as implied-in-law plan terms that may be enforced under § 502(a)(1)(B). *Id.* at 10-14. This argument fails for three reasons.

First, it contradicts the statutory text. Section 502(a)(1)(B) authorizes only those actions in which a participant seeks to recover "benefits due to him *under the terms of his plan*." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). By contrast, ERISA § 502(a)(3) authorizes actions that seek the enforcement of *either* "any provision of this title *or* the terms of the plan." 29 U.S.C. § 1132(a)(3) (emphasis added).

Under the Government's reading of § 502(a)(1)(B), that provision has exactly the same meaning that it would have if it authorized a plan participant to recover "benefits due to him under *any provision of this title or* the terms of his plan." But despite referring to "any provision of this title" in § 502(a)(3), Congress omitted that language from § 502(a)(1)(B). Especially in a reticulated statute such as ERISA, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Second, the Government ignores the fact that Congress deliberately excluded actions to enforce ERISA provisions from the scope of § 502(a)(1)(B) in order to maintain exclusive federal jurisdiction over those provisions. With two exceptions, ERISA

§ 502(e) grants federal courts "exclusive jurisdiction" over ERISA actions. 29 U.S.C. § 1132(e). The two exceptions are that state courts have concurrent jurisdiction over suits brought under § 502(a)(1)(B) and suits brought by state governments to enforce qualified medical child support orders. *See id.* As Congress explained in the Conference Report on ERISA, this allocation of jurisdiction was intended to permit state courts to hear suits that solely involve the contractual terms of a plan document, but to prevent them from hearing suits that "involve application of the title I provisions," *i.e.*, the provisions of ERISA. H.R. Conf. Rep. No. 93-1280, reprinted in 1974 U.S.C.C.A.N 5038, 5107. By contrast, federal courts were given exclusive jurisdiction over "actions to enforce or clarify *benefit rights provided under title I.*" *Id.* (emphasis added).[2]

The Government's interpretation of § 502(a)(1)(B) thwarts Congress's intended allocation of jurisdiction by allowing state courts to enforce ERISA provisions under their § 502(a)(1)(B) jurisdiction. It also turns the exclusive federal jurisdiction provision in § 502(e) into a hollow shell. ERISA's most important provisions – its fiduciary, vesting, accrual, anti-cutback, and forfeiture provisions – all affect the size of a participant's

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[2] The Government notes that a sentence in the Conference Report states that suits seeking the enforcement of plan terms "aris[e] under the laws of the United States in a similar fashion to those brought under section 301 of the [LMRA]." U.S. Br. 15 n.4. That sentence merely means that *federal* courts have federal question jurisdiction to hear suits that seek the enforcement of plan terms, not that *state* courts can hear suits to enforce ERISA provisions.

benefit.[3] Under the Government's reading of § 502(a)(1)(B), state courts may enforce all of these core ERISA provisions on the theory that the provisions constitute implied-in-law plan terms.

Third, the Government confuses the fact that plan terms are *subordinate* to the provisions of ERISA with the very different proposition that the terms of the plan *include* ERISA provisions for purposes of § 502(a)(1)(B). For example, the Government quotes language from *Central Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739, 750 (2004), to the effect that ERISA's anti-cutback rule overrides contrary plan terms and effectively "adds a mandatory term to all retirement packages." U.S. Br. 11. But a rhetorical statement that an ERISA provision effectively adds a mandatory term to a retirement package is a far cry from literally reading an ERISA provision into "the terms of the plan" within the meaning of § 502(a)(1)(B) – a provision that was deliberately written to exclude ERISA provisions from its scope. No decision of this Court holds or implies that ERISA provisions may be enforced under § 502(a)(1)(B). *See* Reply Br. 7-8.[4]

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[3] For example, any fiduciary breach that reduces the size of the plan's assets will reduce the benefits of participants in defined contribution plans, since in those plans a participant's benefit consists of an allocated share of the plan's total assets. *See* 29 U.S.C. § 1002(34).

[4] The Government also argues that *Unum Life Ins. Co.* v. *Ward*, 526 U.S. 358 (1999), shows that state insurance regulations, which are saved from ERISA preemption by the savings clause for state regulation of insurance, may be read into terms of ERISA insurance plans. U.S. Br. 11. Even if that is correct, (...continued)

The Government also notes that ERISA § 404(a)(1)(D) requires plan administrators to follow the provisions of ERISA if those provisions conflict with the terms of the plan. U.S. Br. 10-11. In the Government's view, if a *plan administrator* is required to enforce the provisions of ERISA, a *court* must have the power to do so as well. U.S. Br. 16. This argument attacks a straw-man. As shown below, the question here is not *whether* courts can enforce ERISA provisions, but *which* courts may do so – state courts or federal courts – and under *which* ERISA cause of action provision.

2. In an amicus brief submitted in *Oddino* v. *Oddino*, *supra*, the Government advocated Petitioners' interpretation of § 502(a)(1)(B), arguing that where a plaintiff seeks "to enforce a provision of ERISA," ERISA "vests exclusive jurisdiction in the federal district courts." 1997 WL 33559420, *21 (U.S. Br. Jan. 16, 1997) (header); *see also id.* at *22-23 (arguing that in an "action to enforce a provision of ERISA, jurisdiction ... is exclusively in federal court."). The Government apparently has changed its position based on a mistaken concern that a textual interpretation of § 502(a)(1)(B) would "substantially restrict relief in cases involving plan terms that ERISA renders illegal." U.S. Br. 16.

Contrary to the Government's assertion, relief is available in cases in which plan terms violate ERISA, but it is available exclusively in federal court under § 502(a)(3). Specifically, a participant may sue

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there is nothing troubling about the prospect of state courts enforcing state insurance regulations against insurance plans.

under § 502(a)(3) for the equitable relief of reformation of the plan to conform the plan to the provisions of ERISA. *See* Pet. 18 n.7. Indeed, the Government appears to acknowledge that the *Ross* and *Carrabba* decisions discussed above both identify reformation of the plan under § 502(a)(3) as the proper means for seeking relief in this situation. *See* U.S. Br. 17-18. Moreover, the Government itself recently argued to this Court in *Amschwand* v. *Spherion*, No. 07-841, that § 502(a)(3) allows "'monetary relief ... against fiduciaries who breach their ERISA duties.'" Pet. Supp. Br. of May 30, 2008 at 3 (quoting U.S. Br. in *Amschwand*).

Here, Respondents cannot obtain relief under § 502(a)(3) because a reformation of the Plan is barred by another ERISA provision, *see* 26 U.S.C. § 436(c), and because the Sixth Circuit found that Respondents waived any such relief in the District Court, *see* Pet. 9. But relief ordinarily will be available to a participant harmed by plan terms that violate ERISA.

3. The Government commits a fundamental error when it asserts that Respondents' claim to the additional benefits they seek "arises under Section 1.2 of the Plan." U.S. Br. 13. The terms of the Plan expressly provide that lump sum payments to participants shall be "equal" to a participant's account balance. Pet. App. 90a (§§ 4.1, 4.2). Respondents argue that ERISA overrides these plan terms and requires a whipsaw calculation that results in lump sum payments *greater* than their account balances. *See* Reply Br. 1-4. Neither Plan Section 1.2 nor any other Plan term promises a lump sum payment greater than an account balance.

Indeed, Section 1.2 does not address the calculation of lump sum payments *at all*. Instead it describes the calculation of a "single life annuity" beginning at age 65. Pet. App. 76a. The Government's bald assertion that "Section 1.2 of the Plan entitled [Respondents] to lump-sum distributions that were actuarially equivalent to the amounts in their hypothetical plan accounts," U.S. Br. 13, is therefore nonsensical. Section 1.2 describes an entitlement to a single life annuity, not an entitlement to a lump sum payment. Pet. App. 76a.

Respondents cannot look to Plan Section 1.2 for any help in determining the size of their lump sum payments. Instead, as the Sixth Circuit recognized, Respondents' claim depends on the twin propositions that "the Plan's terms ... did not comply with the law," Pet. App. 26a, and that ERISA's requirements may be enforced under § 502(a)(1)(B), *see* Reply Br. 2. Even the Government concedes that "the decision below is ultimately based on the [Sixth Circuit's] conclusion that petitioner's interpretation of the Plan would violate ERISA." U.S. Br. 20. Accordingly, this case squarely presents the question of whether ERISA provisions may be enforced under § 502(a)(1)(B).

C. The Issue Is Exceptionally Important.

As the Government concedes (U.S. Br. 14-15), the Sixth Circuit's interpretation of § 502(a)(1)(B) allows state courts to enforce ERISA provisions – something that until now state courts have correctly declined to do. This creates the troubling prospect that fifty different state court systems will adopt inconsistent interpretations of ERISA's complex

provisions. Congress rightly worried that this would pose a serious threat to uniformity and predictability in the regulation of ERISA plans and would discourage employers from offering such plans. *See* Pet. 19-21. Review should be granted to assure that the enforcement of ERISA remains – as Congress expressly provided – an exclusively federal responsibility.

II. The Court Should Review The *Contra Proferentem* Issue.

The Sixth Circuit applied the canon of *contra proferentem* to reject the Plan Administrator's interpretation of the Plan. *See* Pet. 22-26. The Government acknowledges that the Sixth Circuit applied *contra proferentem* here, agrees that the circuits are split on whether *contra proferentem* may override a plan administrator's interpretation of a plan, and does not deny that this is a recurring and important issue in the interpretation of ERISA plans. *See* U.S. Br. 19-20. The Government's argument that this is not a good case for resolving the circuit split is unpersuasive.

The Government asserts that *contra proferentem* did not change the outcome in this case because (i) the Sixth Circuit ultimately held that the Plan violates ERISA, and (ii) the courts of appeals agree that ERISA requires a whipsaw calculation. *See* U.S. Br. 20, 21. Both of these arguments overlook the fact that adoption of the Plan Administrator's interpretation of the Plan would have avoided any conflict between the Plan and ERISA's requirements.

Under the Plan Administrator's interpretation of the Plan, the Plan qualifies for special treatment under the applicable ERISA provisions, and as a result the whipsaw calculation merely requires lump sum payments equal to a participant's account balance – just as the Plan provides. *See* Pet. 11-12 & n.4; Reply Br. 9-10; CA App. Br. 46-48. Neither the Sixth Circuit nor any other court has rejected this interpretation of ERISA. Instead, the Sixth Circuit applied *contra proferentem* to reject the interpretation of the Plan that would have allowed the Plan to qualify for this treatment. *See id. Contra proferentem* thus changed the outcome of this case.

The Government also asserts that "[t]he parties did not brief the issue in the court of appeals," U.S. Br. 20-21, but Petitioner expressly argued in the court of appeals that the Plan Administrator's interpretation of the Plan avoided any conflict between the Plan and ERISA. C.A. App. Br. 46-48. Petitioner further agued that this interpretation "is reviewed under the deferential 'arbitrary and capricious' standard and should be upheld so long as it is susceptible of 'reasoned explanation.'" *Id.* at 49; *see also* C.A. Reply Br. 18. The Sixth Circuit applied *contra proferentem* to reject the Plan Administrator's interpretation and the argument made in Petitioners' briefs. In any event, since it is undisputed that the Sixth Circuit applied *contra proferentem* to override the Plan Administrator's interpretation of the Plan, this case is a good vehicle for resolving the *contra proferentem* circuit split.

CONCLUSION

The Petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

AK STEEL CORPORATION RETIREMENT ACCUMULATION PENSION PLAN AND AK STEEL CORPORATION BENEFIT PLANS ADMINISTRATIVE COMMITTEE

Petitioners,

v.

JOHN D. WEST, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Review should be granted to resolve two important questions on which the circuits are divided.

I. The § 502(a)(1)(B) Issue Warrants This Court's Review.

The Sixth Circuit held that Respondents could enforce ERISA statutory provisions under ERISA § 502(a)(1)(B) even though § 502(a)(1)(B) applies only to claims arising under "the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). That holding exacerbates a circuit split on the scope of § 502(a)(1)(B) and jeopardizes the federal courts' exclusive jurisdiction over the interpretation of ERISA. *See* Pet. 13-21.

Respondents counter by hotly denying that their claim is a statutory claim. Opp'n 1-2. The heat of Respondents' rhetoric, however, is inversely related to the strength of their argument. The District Court, the Sixth Circuit, and Respondents themselves all acknowledged in the proceedings below that Respondents seek to enforce provisions of ERISA, not "the terms of the plan."

A. Respondents asserted a statutory claim.

Respondents assert that "[t]his case does not involve a claim for 'statutory violation of ERISA.'" Opp'n 3. Their own brief belies that contention. As stated in the Brief in Opposition, Respondents' claim is that the Plan violated the "core principle of ERISA" that a lump sum payment from a pension plan must be the "actuarial equivalent" under 26 USC § 417(e) of the annuity that a participant could

have elected to receive beginning at age 65. Opp'n 8, 13.

That claim seeks to enforce a purported ERISA *statutory* guarantee. There is no guarantee in the *Plan* that a participant's lump sum payment shall be the "actuarial equivalent" of an annuity payable at age 65. The Plan provides only that lump sum payments shall be equal to a participant's account balance. Pet. App. 90a. Nor do Respondents *argue* that the Plan provides an actuarial equivalence guarantee. Respondents derive such a guarantee solely from ERISA – specifically, from ERISA §§ 204(c)(3) and 203(a)(2)(A) and the corresponding regulations. *See* Opp'n 4-6, 8-9, 11. It is these ERISA *statutory* provisions that Respondents seek to enforce.

Respondents expressly conceded in the proceedings below that their claim is a statutory claim. They alleged in the Complaint that "The primary question that will determine defendants' liability. . . is whether defendants violated ERISA § 204(c)(3) and I.R.C. § 417(e) by issuing lump sum distributions that were less than the 'actuarial equivalent' of an annuity commencing at normal retirement age. . . ." C.A. App. 22. Similarly, in opposing Petitioners' motion to dismiss, Respondents argued:

> The claim in this case does not seek an interpretation of the plan. Rather, plaintiffs' claim is that the Plan itself violates ERISA and the Internal Revenue Code – specifically, that the method provided in the Plan for lump

> sum distributions violates ERISA § 204(c)(3) and I.R.C. § 417(e).

App., *infra*, 3a.

The District Court and the Sixth Circuit both agreed with Respondents that their claim is a statutory claim. In denying Petitioners' motion to dismiss, the District Court found:

> Plaintiff is not disputing that the AK Steel Committee calculated his benefit in accordance with the terms of the AK Steel Plan. Rather, he is arguing that the plan itself violates ERISA.

C.A. App. 65. The Sixth Circuit likewise observed that: "The plaintiffs argue that ERISA mandates the whipsaw calculation. . . and that AK Steel's failure to calculate lump sum distributions in this manner constitutes a statutory violation of ERISA." Pet. App. 8a. The Sixth Circuit ultimately accepted this statutory argument, holding that "[t]he Plan's terms thus did not comply with the law." *Id.* at 26a.

Respondents nevertheless assert that all they are seeking is payment of the "accrued benefit" defined in Section 1.2 of the Plan. Opp'n 13. That is not correct. Section 1.2 defines an "accrued benefit" as an annuity beginning at age 65. Pet. App. 76a. Respondents did not *elect* an annuity payable at age 65 and they are not *suing* for an annuity payable at age 65. Instead, Respondents are suing for an increase in their lump sum payments. Section 1.2 of the Plan says nothing about the calculation of lump sum payments; such payments are governed by Plan Section 4.1. *See id.* at 76a, 90a.

Respondents' rhetoric notwithstanding, they are not suing to enforce Plan Section 1.2's definition of "accrued benefit"; they are suing to *override* Section 4.1's provision that lump sum payments shall be equal to a participant's account balance. Their claim, stated in their own words, is that "Section 4.1 is void for illegality" because it violates a "core principle of ERISA." Opp'n 13, 20-21.

B. The circuits are divided on the interpretation of § 502(a)(1)(B).

Respondents' rhetoric fails to obscure the fact that the Sixth Circuit enforced a purported ERISA *statutory* guarantee under § 502(a)(1)(B). *See* Pet. App. 19a-24a, 26a-27a. That unavoidable fact places the Sixth Circuit's decision in conflict with decisions of the Fifth Circuit, the Eighth Circuit, and the courts of several states.

Respondents *do not dispute* that the Sixth Circuit's decision conflicts with decisions of several state courts. *See* Pet. 14-18. Respondents' failure to address these state court decisions is understandable: the decisions cannot be reconciled with the holdings of the Sixth and Seventh Circuits that ERISA provisions may be enforced under § 502(a)(1)(B).

Respondents argue that there is no conflict with the Eighth Circuit's decision in *Ross* v. *Rail Car Am. Group Disability Income Plan*, 285 F.3d 735 (8th Cir. 2002), because *Ross* allegedly "did not involve a claim for benefits due under. . . the requirements of ERISA." Opp'n 17. But *Ross* involved precisely such a claim. The plaintiff in *Ross* argued that he was entitled to additional benefits because two plan

amendments that reduced his benefits had been adopted in violation of ERISA § 402(b)(3). 285 F.3d at 740. The Eighth Circuit held that this was not a claim for benefits due "under the terms of the plan" that could be asserted under § 502(a)(1)(B), but was instead an attempt to "enforce a provision of [ERISA]" that could be asserted only under § 502(a)(3). *Id.* at 740-41. That holding directly conflicts with the Sixth Circuit's holding that a plan participant *can* enforce ERISA provisions under § 502(a)(1)(B).

Respondents also assert that there is no conflict with the Fifth Circuit's decision in *Carrabba* v. *Randalls Food Markets, Inc.*, 252 F.3d 721 (5th Cir. 2001), because *Carrabba* merely affirmed a district court decision "without opinion." Opp'n 18. In fact, the Fifth Circuit *did* issue a short published opinion in *Carrabba*. The court's opinion affirms the district court decision "based on that court's conscientious, well-reasoned opinions, which will be published." 252 F.3d at 721. The Fifth Circuit thus adopted the district court's holding that ERISA provisions cannot be enforced under § 502(a)(1)(B). *See Carrabba* v. *Randalls Food Mkts., Inc.*, 145 F. Supp. 2d 763, 770 (N.D. Tex. 2000). That holding squarely conflicts with the Sixth Circuit's decision in this case.

C. Review should be granted to restore exclusive federal jurisdiction over ERISA.

Respondents do not deny that the Sixth Circuit's interpretation of § 502(a)(1)(B) allows state courts to interpret and apply the provisions of ERISA. *See* Pet. 19-22. They argue, however, that

preserving exclusive federal court jurisdiction over ERISA does not matter because state courts are competent expositors of federal law. *See* Opp'n 18-19.

It mattered a great deal to Congress. Congress did not want the nation's pension plans to be subjected to a conflicting patchwork of decisions rendered by the courts of fifty different states. *See* Pet. 19-21. It therefore crafted the provisions of § 502(a) to restrict the interpretation of ERISA exclusively to federal courts. *See id.* The Sixth Circuit's reading of § 502(a)(1)(B) thwarts that Congressional design. Certiorari should be granted to assure that the interpretation of ERISA will remain, as Congress intended, "exclusively a federal concern." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004).

D. Respondents' merits arguments are unavailing.

Respondents argue that the Sixth Circuit was correct to hold that ERISA provisions may be enforced under § 502(a)(1)(B) because, they say, the provisions of ERISA are "implied" terms of a pension plan. *See* Opp'n 15-16. That argument founders on the language of the statute. The remedial provisions of ERISA § 502(a) draw an explicit distinction between claims that seek the enforcement of plan terms and claims that seek the enforcement of ERISA provisions. Section 502(a)(1)(B) applies only to claims based on "the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Section 502(a)(3), by contrast, applies to claims based on either the "provisions of this title *or* the terms of the plan." 29 U.S.C. § 1132(a)(3) (emphasis added).

This clear and precise statutory language refutes any argument that ERISA statutory claims may be shoe-horned into § 502(a)(1)(B) on the theory that ERISA provisions constitute "implied" plan terms. If that were the case, then § 502(a)(1)(B)'s reference to "the terms of the plan" would have the same meaning as § 502(a)(3)'s reference to the "provisions of this title *or* the terms of the plan." That cannot be correct, particularly in a "carefully crafted" and "reticulated" provision such as ERISA § 502(a). *See Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 251-54, 257-78 (1993).

Respondents pluck rhetoric from this Court's decisions in an effort to support their argument, *see* Opp'n 15-16, but these decisions merely support the elementary proposition that plan terms are subordinate to, and overridden by, provisions of ERISA. This Court's decisions do *not* endorse the very different proposition that ERISA statutory claims may be treated as claims that seek enforcement of "the terms of the plan" within the meaning of § 502(a)(1)(B). Congress used the phrase "the terms of the plan" in § 502(a)(1)(B) precisely and deliberately. Indeed, it used that phrase for the specific purpose of *excluding* statutory claims from the ambit of § 502(a)(1)(B), so that state courts would have no jurisdiction to interpret ERISA provisions. *See* Pet. 20-21. Respondents' "implied" plan terms argument tramples this "carefully crafted" Congressional design. *Mertens*, 508 U.S. at 254. *See also* Pet. 17-18.

Far from supporting Respondents' argument, this Court's decisions support Petitioners. In *Varity Corp.* v. *Howe*, for example, this Court observed that

§ 502(a)(1)(B) provides a remedy for claims based on "the interpretation of *plan documents*." 516 U.S. 489, 512 (1996) (emphasis added). Similarly, in *Davila*, this Court explained that § 502(a)(1)(B) "is relatively straightforward. If a participant or beneficiary believes that *benefits promised to him under the terms of the plan* are not provided, he can bring suit seeking provision of those benefits." 542 U.S. at 210 (emphasis added). Here, Respondents seek neither "the interpretation of plan documents" nor "benefits promised under the terms of the plan." Instead, they seek benefits allegedly promised by the provisions of ERISA.

Respondents also assert that if ERISA provisions cannot be enforced under § 502(a)(1)(B), then "any plan could deprive its participants of § 502(a)(1)(B)'s remedy for 'benefits due' simply by stating that the plan's 'accrued benefit' will not be paid."[1] Opp'n 14. Not so. A court confronted with such a plan could reform the plan to comply with ERISA under ERISA § 502(a)(3). *See* Pet. 18 n.7. Significantly, only a *federal* court may hear a claim under § 502(a)(3).[2]

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[1] This case is far removed from Respondents' hypothetical. The Plan was adopted in 1994, before the whipsaw theory emerged from the IRS. Indeed, the IRS expressly approved the Plan as lawful in a determination letter granted in 1996. Pet. App. 6a. The Plan merely adopted a method of calculating lump sum payments that in hindsight has been found to violate an unanticipated interpretation of ERISA.

[2] Respondents here may not proceed under § 502(a)(3) because the Sixth Circuit found that they waived any claim under § 502(a)(3) in the Complaint, and because they did not attempt (...continued)

II. The *Contra Proferentem* Issue Warrants This Court's Review.

A. *Contra proferentem* made a difference in this case.

Respondents assert that *contra proferentem* made no difference to the Sixth Circuit's decision in this case. Opp'n at 20-22. The Sixth Circuit's opinion does not support that assertion: the court explicitly relied on *contra proferentem* to reject a defense to the asserted whipsaw violation.

As explained in the Petition, a Treasury Regulation divides defined benefit plans into two categories: those that express benefits in the form of an annuity payable at age 65, and those that express benefits in some *other* form such as an account balance. Pet. 11-12 & n.4. For plans that express benefits in a form *other* than an age-65 annuity, ERISA provides that the "project-forward" step of the whipsaw calculation should be performed at the same interest rate as the "discount-back" step. *Id.* Cash balance plans that qualify for this treatment can make lump sum payments equal to a participant's account balance without violating ERISA. *Id.* at 12. Here, under the Plan Administrator's interpretation of the Plan, the Plan qualifies for this treatment. The Plan Administrator construed the Plan as one that expresses benefits in

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to make the necessary showing that a reformation of the Plan would be "equitable" and "appropriate." *See* Pet. 9-10, 18 n.7.

the form of an account balance rather than an age-65 annuity. *Id.*

The Sixth Circuit held, however, that the Plan cannot take advantage of the Treasury Regulation because the Plan expresses benefits in the form of an age-65 annuity. App. 25a-26a. In reaching this conclusion, the court acknowledged a potential conflict between the Plan's definition of "accrued benefit" and its provisions relating to lump sum payments. *Id.* at 26a. Rather than determining whether the Plan Administrator's resolution of this ambiguity was an abuse of discretion, the court invoked *contra proferentem* to summarily resolve the ambiguity against the drafter: "To the extent that the Plan's language with respect to lump-sum distributions is ambiguous in that it conflicts with the definition of 'accrued benefit' in another section of the Plan, the ambiguity must be resolved in the plaintiffs' favor." *Id.* The decision thus applied *contra proferentem* to cut off a defense to Respondents' claim. *See also* Pet. 25-26.

Curiously, Respondents invoke the principle that ERISA plans should not be interpreted "in a way that violates the requirements of ERISA." Opp'n 21-22. That principle supports the Plan Administrator's interpretation of the Plan. The Plan Administrator construed the Plan in a manner that *avoids* any violation of ERISA. The Sixth Circuit, applying *contra proferentem*, overruled that interpretation in favor of one that *creates* a violation.

Citing the deposition testimony of AK Steel employee Richard Ford, Respondents also argue that "the plan administrator testified he had never considered" Section 1.2 of the Plan. Opp'n 2, 21 n.6.

Respondents assert that this testimony undermines "the plan administrator's" interpretation of the Plan, but they are fundamentally mistaken: the Plan Administrator is the Benefit Plans Administrative Committee, not Mr. Ford. Pet. App. 92a. Mr. Ford is simply a corporate employee who performs day to day administrative functions and carries out the instructions of the Committee. He has no responsibility or authority to interpret the provisions of the Plan; that power lies with the Committee. *Id.*

B. The circuits are split on the *contra proferentem* issue.

Respondents do not dispute that four circuits hold that *contra proferentem* does not apply where, as here, an ERISA plan grants the plan administrator discretion to interpret the plan. *See* Pet. 24-25 (citing cases from the Second, Eighth, Ninth, and Tenth Circuits).

By contrast, the Fourth and Sixth Circuits *do* apply *contra proferentem* in these circumstances. *See* Pet. 25-26. Respondents try to minimize the Sixth Circuit's application of *contra proferentem* by citing dicta from unpublished Sixth Circuit decisions. Opp'n 24-26. Even the farthest-reaching statement quoted by Respondents, however, states only that *contra proferentem* does not "*completely* contradict" deference to an administrator. *Id.* at 25, quoting *Mitchell* v. *Dialysis Clinic, Inc.*, 18 F. App'x 349, 353 (6th Cir. Aug. 24, 2001) (unpublished) (emphasis added). Moreover, the published decision in this case confirms that the Sixth Circuit does, in fact, apply *contra proferentem* notwithstanding a plan administrator's discretion to interpret the plan. The decision quotes and relies on unequivocal Sixth

Circuit precedent: "Any ambiguities in the language of the ERISA plan are to be construed strictly against the drafter of the plan." Pet. App. 26a, quoting *Regents of the Univ. of Mich.* v. *Employees of Agency Rent-A-Car Hosp. Ass'n*, 122 F.3d 336, 340 (6th Cir. 1997) (brackets omitted).

The Fourth Circuit follows the same approach as the Sixth. *See* Pet. 26. Contrary to Respondents' assertion, in *Carolina Care Plan, Inc.* v. *McKenzie*, the court made clear that "when plan language is ambiguous, this well-established doctrine of *contra proferentem* does apply." 467 F.3d 383, 389 (4th Cir. 2006). The court stated that it would defer only to the administrator's interpretation of "*unambiguous* plan terms." *Id.*

Furthermore, Respondents acknowledge the differing "hybrid approach" adopted by the Fifth Circuit. Opp'n 23-24. That approach applies *contra proferentem* to determine the "legally correct" interpretation of an ERISA plan and compares it to the administrator's interpretation. *Id.*, citing *Spacek* v. *Maritime Ass'n*, 134 F.3d 283, 298 (5th Cir. 1998); *see also id.* at 299 n.14. Though Respondents do not mention it, the Eleventh Circuit takes the same "hybrid" approach. *See* Pet. 27.

Respondents cite the Tenth Circuit's dicta that it "do[es] not view [the Fifth Circuit's approach] as conflicting." Opp'n at 24, citing *Kimber* v. *Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999). Nevertheless, the Fifth and Eleventh Circuits would reach different results than the Tenth and other circuits in many cases. If a plan administrator construes the plan differently from the *contra proferentem* construction, the Eleventh Circuit will

uphold the administrator's construction *only* if the plan administrator proves its decision "is not tainted by self-interest." *HCA Health Servs. of Ga., Inc.* v. *Employers Health Ins. Co.*, 240 F.3d 982, 994-95 (11th Cir. 2001). The other circuits impose no such requirement on plan administrators.

Certiorari should be granted to resolve this conflicting circuit authority.

CONCLUSION

The petition for a writ of certiorari should be granted.

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January 2, 2008

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

John D. West, on Behalf Of Himself
and All Other Persons Similarly Situated

Plaintiffs

v.

AK Steel Corporation (formerly ARMCO Inc.)
Retirement Accumulation Pension Plan, a Part of the
AK Steel Corporation (formerly ARMCO Inc.)
Noncontributory Pension Plan and AK Steel
Corporation Benefit Plans Administrative
Committee,

Defendants

Case No.: C-1-02 0001

District Judge Sandra S. Beckwith

Magistrate Judge Jack Sherman, Jr.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR ENTRY OF JUDGMENT THAT PLAINTIFF'S CLAIM IS TIME-BARRED

This class action was brought by named plaintiff John D. West on behalf of himself and over 700 other participants in the AK Steel Corporation Retirement Accumulation Pension Plan who retired

or were terminated on or after January 1, 1995 and received lump sum distributions of their pension benefits ("Plaintiffs"). Plaintiffs claim that the method provided in the Plan for calculating lump sum distributions violated the Employee Retirement Income Security Act ("ERISA") and corresponding provisions of the Internal Revenue Code ("I.R.C.").

Defendants assert that the named plaintiffs claim is "time-barred," citing a line of cases holding that "reasonable contractual limitations of a party's right to bring suit are enforceable and supersede the statute of limitations under state law." *Allen v. Unionmutual Stock Life Ins. Co. of America*, 989 F. Supp. 961, 965 (S.D. Ohio 1997). *See also Santino v. Provident Life & Accident Ins. Co.*, 276 F.3d 772, 774-76 (61' Cir. 2001). However, those cases involve express contractual limitations on the commencement of suit. *See, e.g.*, Santino, 276 F.3d at 774 (bracketed insert by the court) ("No [legal] action may be brought after three years from the time written proof of loss is required to be given"). In contrast, the Plan provision relied on by Defendants is not a limitation period for the commencement of suits against the Plan, but merely a time limit for seeking an administrative remedy under the Plan's internal appeals procedure. As shown below, the named plaintiffs claim is not "time-barred" by that provision, either on the basis of the statute of limitations defense asserted by Defendants or under the doctrine of exhaustion of administrative remedies.

A. Plaintiffs Assert A Statutory Claim That the Method Provided in the Plan for Calculating Lump Sum Distributions Violates ERISA and the Internal Revenue Code

Plaintiffs' claim is a statutory claim – that the method provided in the Plan for calculating lump sum distributions violates ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), and I.R.C. § 417(e). The nature of the claim has an important bearing on Defendants' contention that the claim is "time-barred," and is explained in detail below.

* * *

2. By the nature of the claim presented in this case, exhaustion of administrative remedies should not be required

Another reason why any non-exhaustion involving the 90-day administrative filing provision should be excused arises from the nature of Plaintiffs' claim. The claim in this case does not seek an interpretation of the plan. Rather, Plaintiffs' claim is that the Plan itself violates ERISA and the Internal Revenue Code – specifically, that the method provided in the Plan for calculating lump sum distributions violates ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), and I.R.C. § 417(e). A wealth of case law in the Sixth Circuit and elsewhere establishes that exhaustion of administrative

remedies is not required in order to seek a federal court adjudication of ERISA and I.R.C. violations.

* * *

Conclusion

For the reasons addressed above, defendants' motion for entry of judgment that plaintiffs' claim is time-barred should be denied.

Respectfully submitted,

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No. 07-663

In the Supreme Court of the United States

AK STEEL CORPORATION RETIREMENT ACCUMULATION PENSION PLAN, ET AL., PETITIONERS

v.

JOHN D. WEST, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining that respondents' claim was a claim "to recover benefits due [to them] under the terms of the plan" under Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(1)(B).

2. Whether the court of appeals erred in applying the principle of *contra proferentem* in affirming the district court's award of additional retirement benefits to respondents.

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In the Supreme Court of the United States

No. 07-663

AK STEEL CORPORATION RETIREMENT ACCUMULATION PENSION PLAN, ET AL., PETITIONERS

v.

JOHN D. WEST, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, pension plans are classified as either "defined contribution plans" or "defined benefit plans." A "defined contribution plan" provides "an individual account for each participant," and benefits are "based solely upon the amount contributed" to that account by the participant and his employer. 29 U.S.C. 1002(34). Under such a plan, "[t]he employee bears the investment risks and the

employer does not guarantee a retirement benefit to the employee." *Register* v. *PNC Fin. Servs. Group, Inc.*, 477 F.3d 56, 61-62 (3d Cir. 2007).

A "defined benefit plan" is generally any other type of pension plan. 29 U.S.C. 1002(35). Under a traditional defined benefit plan, the participant is entitled to certain benefits upon retirement, and the "employer's contribution is adjusted to whatever level is necessary to provide those benefits." *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 364 n.5 (1980). Such a plan "consists of a general pool of assets rather than individual dedicated accounts." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999). Under such a plan, "members have a right to a certain defined level of benefits, known as 'accrued benefits.'" *Id.* at 440; see pp. 3-4, *infra*.

A "cash balance plan" is a hybrid that is classified as a defined benefit plan. See 26 C.F.R. 1.401(a)(4)-8(c)(3)(i). As under a traditional defined benefit plan, the participant is entitled to certain pension benefits, but as under a defined contribution plan, the participant's benefits are calculated using an account for each participant. *Register*, 477 F.3d at 62. Those accounts are hypothetical and are used for recordkeeping purposes only. 26 C.F.R. 1.401(a)(4)-8(c)(3)(i). Each account reflects the pension benefits that the employee has earned under the plan's benefit formula, which usually consists of "pay credits," which are hypothetical employer contributions, and "interest credits," which are hypothetical earnings on the accumulated account balance. *Register*, 477 F.3d at 62.

b. One of ERISA's primary purposes is to "protect contractually defined benefits." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 (1985). Congress wanted to "mak[e] sure that if a worker has been

promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp.*, 446 U.S. at 375.

ERISA furthers that goal through its non-forfeiture and actuarial-equivalence provisions. First, the statute provides that, in a defined benefit plan, an employee's benefits must vest no later than as provided under the applicable statutory vesting schedule. 29 U.S.C. 1053(a) (2000 & Supp. V 2005). When the employee's benefits vest, the "employee's right to his normal retirement benefit is nonforfeitable," and, if the employee leaves his employment before normal retirement age, he is entitled to the benefit he has accrued up to that point. *Ibid.*

Second, ERISA ensures that, if a participant retires after his pension benefits have vested but before normal retirement age, he is not penalized for that choice. The statute defines a participant's "accrued benefit" as his "accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of [Title 29], expressed in the form of an annual benefit commencing at normal retirement age," *i.e.*, an annuity payable at retirement. 29 U.S.C. 1002(23)(A). ERISA then specifies that, if a participant retires early, his "accrued benefit * * * shall be the actuarial equivalent of" an annuity commencing at normal retirement age. 29 U.S.C. 1054(c)(3). Therefore, if a participant retires early and elects to take a lump-sum distribution of his vested benefits, that lump-sum amount must be at least equal to the present value of the annuity the participant would have received if he had deferred commencement of the

annuity until normal retirement age. See *ibid.*; 26 C.F.R. 1.417(e)-1.[1]

c. ERISA also protects the interests of participants and beneficiaries by "providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). As relevant here, Section 502(a)(1)(B) of ERISA authorizes a plan participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. 1132(a)(1)(B). Section 502(a)(3) authorizes a plan participant, beneficiary, or fiduciary to bring a civil action "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan," or "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. 1132(a)(3).

2. a. Lead respondent John West (respondent) was employed by Armco, Inc., a predecessor to AK Steel Corporation, for over thirty years, and was a participant in what is now petitioner AK Steel Corporation Retirement Accumulation Pension Plan (Plan). Pet. App. 1a, 9a-10a. The Plan is a cash balance pension plan governed by ERISA. *Id.* at 1a, 6a. The Plan vests its administrator, petitioner AK Steel Corporation Benefit

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[1] ERISA's non-forfeiture and actuarial-equivalence provisions are mirrored in the Internal Revenue Code, 26 U.S.C. 401 *et seq.* See 26 U.S.C. 411(a)(2), 411(c)(3). The Secretary of the Treasury has rulemaking authority concerning ERISA's benefit-accrual and vesting provisions. Reorganization Plan No. 4 of 1978, 3 C.F.R. 332, § 101(a) (1979); see also 29 U.S.C. 1202(c) (adopting Secretary's regulations to implement ERISA); 29 C.F.R. 2530.200a-2 (same).

Plans Administrative Committee (Committee), with discretionary authority to interpret the Plan and determine entitlement to benefits. *Id.* at 92a.

As is typical in a cash balance pension plan, the Plan specifies that each participant will have a hypothetical account used for bookkeeping purposes. Pet. App. 75a-76a (Plan § 1.1). The value of that account is based on pay credits and interest credits. *Id.* at 87a-89a (Plan §§ 3.1-3.3). The Plan sets certain minimum rates for calculating interest credits. *Id.* at 88a-89a (Plan § 3.3).

The Plan defines each participant's "accrued benefit" in terms of a benefit paid as an annuity commencing at normal retirement age that is the actuarial equivalent of the amount in the participant's hypothetical account. Pet. App. 76a (Plan § 1.2). That annuity is calculated by projecting the hypothetical account amount forward to the participant's normal retirement date and converting it to an annuity. *Ibid.*

A participant who retires on or after normal retirement date may elect to receive his pension benefits in one of three ways: (a) as a "Full lump-sum payable on his Benefit-Commencement Date equal to his Accounts"; (b) as a "Full annuity beginning on his Benefit Commencement Date equal to the Actuarial Equivalent of his Accounts"; or (c) as a "Partial lump-sum and partial annuity payable or beginning on his Benefit Commencement Date equal to the respective pro-rata amounts determined under (a) and (b) above." Pet. App. 90a (Plan § 4.1). The Plan provides that a participant taking an early retirement benefit also may receive his benefit in any of those three ways. *Ibid.* (Plan § 4.2). No matter how the benefit is distributed, however, the Plan guarantees that the benefit will not be "less than the actuarial equivalent of his accrued benefit deter-

mined under the [Plan] terms." *Id.* at 5a (quoting Plan § 4.8).

b. In August 1997, respondent West elected to take early retirement and to receive his pension benefits in a lump-sum distribution. Pet. App. 9a. The Plan paid him an amount equal to the balance in his hypothetical account. *Id.* at 10a. Respondent filed an administrative appeal, arguing that that lump-sum amount was not the actuarial equivalent of the annuity he would have received at normal retirement age. *Ibid.*

Respondent contended that the Plan should have calculated his lump-sum benefit using a two-step "whipsaw calculation." Under that approach, his hypothetical account balance would be projected forward to normal retirement age using the rate, specified in the Plan, at which interest credits would have accumulated had he stayed in the Plan until normal retirement age. Pet. App. 6a-8a. Then the projected amount would be discounted back to its present value on the date of the lump-sum distribution, *id.* at 7a, using a discount rate specified by statute, see 26 U.S.C. 411(e)(2), 417(e)(3); 29 U.S.C. 1053(e)(2), 1055(g)(3); see also Pet. 11 n.4. If the rate used to calculate interest credits is greater than the statutory discount rate, then the lump-sum benefit would be greater than the participant's hypothetical account balance on the date of distribution. Pet. App. 7a. In respondent's view, the Plan was required to calculate his lump-sum benefit in that manner to comply with the non-forfeiture and actuarial-equivalent provisions of ERISA. *Id.* at 8a; Br. in Opp. 13-14.

The Committee rejected respondent's claim on the grounds that it was untimely and that respondent had received all of the benefits he was due under the Plan. Pet. App. 10a.

3. Respondent filed suit under ERISA Sections 502(a)(1)(B) and 502(a)(3), 29 U.S.C. 1132(a)(1)(B) and 1132(a)(3), arguing that the Committee's failure to use the whipsaw calculation deprived him and a class of similarly situated individuals of benefits due under the Plan, in violation of ERISA. Pet. App. 10a, 36a-37a.

a. The district court granted partial summary judgment to respondents. Pet. App. 36a-60a. It explained that, when a Plan participant "receives his or her benefit in the form of a non-annuity," *e.g.*, as a lump-sum disbursement, "ERISA requires that * * * the alternative form must 'be the actuarial equivalent' of an annuity commencing at normal retirement age." *Id.* at 40a-41a (quoting 29 U.S.C. 1054(c)(3)). Here, the court continued, the whipsaw calculation is required to determine the lump-sum amount that is actuarially equivalent to the annuity each respondent would receive at normal retirement age. *Id.* at 41a-42a. The court relied on Treasury Department regulations that interpreted ERISA to require use of the whipsaw calculation to determine actuarial equivalence for cash balance plans to avoid a forfeiture of accrued benefits, *id.* at 41a-42a, 59a-60a, as well as Section 1.2 of the Plan, which defines each participant's "accrued benefit" as an annuity at normal retirement age, not as his or her hypothetical account balance, *id.* at 45a.

b. The district court also rejected petitioners' contention that respondents' suit was not properly brought under either Section 502(a)(1)(B) or Section 502(a)(3). Pet. App. 61a-68a. It explained that respondents' claim arose under Section 502(a)(1)(B) because respondents seek "benefits 'under the terms of the Plan,'" and the fact that they also argue that Plan terms that reduce

their accrued benefits violate ERISA does not change the nature of their claim. *Id.* at 65a.

4. The court of appeals affirmed. Pet. App. 1a-33a.

a. The court first determined that respondents' claim for relief arose under ERISA Section 502(a)(1)(B). Pet. App. 11a-18a. The court held that respondents "cannot recover the relief they request" as "equitable relief" under Section 502(a)(3) because their complaint "centers on money damages for the alleged underpayment of a benefit," and money damages are "the classic form of legal relief." *Id.* at 12a-13a. But the court determined that respondents' claim was properly brought under Section 502(a)(1)(B), because "the key issue is whether [respondent West] was paid less than the full accrued benefit due him under the AK Steel Plan." *Id.* at 17a. Despite the fact that respondents contended that some Plan terms were illegal under ERISA, the court held that their claim was still one for benefits "under the terms of the Plan" because "those terms must * * * comply with ERISA." *Ibid.*

b. The court of appeals then upheld the district court's use of the whipsaw calculation to award respondents additional benefits. Pet. App. 18a-33a. The court rejected petitioners' argument that they could pay respondents lump-sum benefits equal to their account balances because the Plan "does not provide an accrued benefit in the form of an annual benefit commencing at normal retirement age." *Id.* at 25a (internal quotation marks omitted). The court noted that Section 1.2 of the Plan "clear[ly]" defines the "accrued benefit" to which each participant is entitled as an "annual benefit commencing at normal retirement age." *Id.* at 26a. "To the extent that the Plan's language with respect to lump-sum distributions is ambiguous in that it conflicts with

the definition of 'accrued benefit' in another section of the Plan," the court stated, "the ambiguity must be resolved in [respondents'] favor." *Ibid.* In any event, the court explained, Sections 4.1 and 4.2 of the Plan, which appear to limit a lump-sum disbursement to the participant's account balance (rather than the actuarial equivalent of his accrued benefit), cannot be enforced because they "d[o] not comply with the law," specifically, ERISA's anti-forfeiture and actuarial-equivalence provisions. *Id.* at 26a-27a.[2]

5. The court of appeals denied petitioners' petition for rehearing en banc, with no judge in regular active service calling for a vote. Pet. App. 34a-35a.

DISCUSSION

The court of appeals correctly held that a claim for ERISA plan benefits that requires the court to interpret the provisions of ERISA may be brought under Section 502(a)(1)(B). Petitioners' contrary contention (Pet. 13-14) represents an unduly narrow view of Section 502(a)(1)(B) that is contrary to its text as well as its fundamental purposes. There is no split in the lower courts on this issue, and further review is therefore unwarranted. Petitioners' contention (Pet. 22-27) that the court of appeals erred in applying the principle of *contra proferentem* likewise does not warrant this Court's review. Accordingly, the petition should be denied.

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[2] The court of appeals also rejected petitioners' argument that the Pension Protection Act of 2006 (PPA), Pub. L. 109-280, 120 Stat. 780, applies to respondents' claims. Pet. App. 31a-33a. The PPA amended ERISA to provide that the whipsaw calculation is not required for distributions made after August 17, 2006. PPA § 701, 120 Stat. 981. Because respondents' benefits were paid before that date, the court explained, the PPA does not apply to them. Pet. App. 32a.

A. The Section 502(a)(1)(B) Question Does Not Warrant This Court's Review

1. Petitioners contend (Pet. 13-22) that respondents do not seek "to recover benefits due to [them] under the terms of [the] plan" for purposes of ERISA Section 502(a)(1)(B) because resolution of their claim turns not only on the terms of the Plan but also on ERISA's statutory provisions. That is incorrect. Respondents are not foreclosed from suing to recover additional benefits under Section 502(a)(1)(B) because they claim that Plan provisions that cut back on accrued benefits violate ERISA.

A claim that a plan administrator failed to provide benefits in compliance with the terms of the plan and the provisions of ERISA is a claim for benefits due under the terms of the plan cognizable under Section 502(a)(1)(B). Plan documents create the "contractually defined benefits" that are the focus of ERISA's protective regime. *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 (1985). Because "[n]othing in ERISA requires employers to establish employee benefits plans," *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996), a participant's basic entitlement to benefits arises not under ERISA but under his plan.

ERISA provides, however, that plan fiduciaries must interpret and apply plan documents consistently with the governing provisions of ERISA. See 29 U.S.C. 1104(a)(1)(D) (plan fiduciary must "discharge his duties * * * in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of*" Title I of ERISA (emphasis added)); see *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 568 (1985) ("trust docu-

ments cannot excuse trustees from their duties under ERISA," and "trust documents must generally be construed in light of ERISA's policies").

Accordingly, a plan administrator, as an ERISA fiduciary, must look both to the terms of the plan and the requirements of ERISA in deciding a claim for benefits under the plan. When a participant seeks review of a benefits decision in federal court, the court likewise construes the plan in light of the requirements of ERISA. Although such a suit may turn on both the plan's terms and the statute's requirements, it remains a suit for benefits under the plan within the meaning of Section 502(a)(1)(B). See *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996) (Section 502(a)(1)(B) "specifically provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims").

This Court has repeatedly recognized that ERISA plans must be interpreted and applied to adhere to ERISA's requirements. In *Central Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739 (2004), for example, the Court observed—in the specific context of a suit "to recover * * * suspended benefits"—that ERISA's prohibition of forfeitures provides "a global directive that regulates the substantive content of pension plans" and "adds a mandatory term to all retirement packages that a company might offer." *Id.* at 742, 750. Similarly, in *Unum Life Ins. Co. of Am.* v. *Ward*, 526 U.S. 358 (1999), the Court concluded that a state insurance law provision that was saved from preemption under ERISA "effectively create[d] a mandatory contract term that required the insurer to prove prejudice before enforcing a timeliness-of-claim provision," and thereby overrode any contrary plan terms. *Id.* at 374, 376-377 (internal

quotation marks omitted). The *Unum* Court specifically noted that the participant's claim was one "to recover benefits due . . . under the terms of his plan," even though it was the state-law notice-prejudice rule, which overrode the terms of the plan, that "supplied the relevant rule of decision." *Id.* at 377.[3]

The principle that ERISA plans incorporate the requirements of ERISA is consistent with the fundamental principle of contract law that "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms." *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991). That principle is also reflected in trust law, which makes clear that a trust must be interpreted and applied consistently with governing law. See Restatement (Second) of Trusts §§ 62, 166 (1959) (discussing unenforceability of illegal terms and duty of trustee to administer trust in compliance with the law). And the same principle has been applied under Section 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. 141 *et seq.*, from which ERISA was drawn. See *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 76-79 (1982) (collective bargaining agreement was subject to federal labor and antitrust laws); see also 29 U.S.C. 185 (§ 301).

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[3] See also, *e.g.*, *Feifer* v. *Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1210 (2d Cir. 2002) ("ERISA's written instrument requirement essentially operates as a strong integration clause, statutorily inserted in every plan document." (internal quotation marks omitted)); *May Dep't Stores Co.* v. *Federal Ins. Co.*, 305 F.3d 597, 601-602 (7th Cir. 2002) ("[L]ike many other contracts, pension plans governed by ERISA contain provisions implied by law.").

Applying that principle, the court of appeals correctly determined that respondents' claim was one "to recover benefits due to [them] under the terms of [the] plan" for purposes of Section 502(a)(1)(B). Respondents contended that they "w[ere] paid less than the full accrued benefit due [them]" under the Plan, because Section 1.2 of the Plan entitled them to lump-sum distributions that were actuarially equivalent to the amounts in their hypothetical accounts, and Sections 4.1 and 4.2 of the Plan, which appeared to limit their lump-sum distributions to the amounts in their hypothetical accounts, violated the requirements of ERISA. *Id.* at 8a, 17a; Br. in Opp. 13-14. The relief respondents seek is in the form of additional retirement benefits, and their entitlement to those benefits arises from Section 1.2 of the Plan. The fact that respondents also contend that contrary Plan provisions are illegal under ERISA does not change the character of their claims.

2. Petitioners contend (Pet. 13-14) that Section 502(a)(1)(B) is confined to claims that rely solely on plan terms without regard to the provisions of ERISA, because Section 502(a)(1)(B) "authorizes relief only for violations of 'the terms of the plan,'" while Section 502(a)(3) "authorizes relief for violations of *either* 'any provision of this title *or* the terms of the plan.'" That argument fails. Respondents' claim *is* a claim for Plan benefits, because their entitlement to benefits arises under Section 1.2 of the Plan. Neither plan administrators nor the courts can properly resolve benefit claims without regard to the provisions of ERISA, because ERISA specifies that plan terms are operative only to the extent that they "are consistent with" the statutory provisions, 29 U.S.C. 1104(a)(1)(D), and the require-

ments of ERISA are therefore incorporated into ERISA plans. See pp. 10-13, *supra*.

In contrast to Section 502(a)(1)(B)'s specific focus on benefit claims, Section 502(a)(3) functions as a "'catch-all[],' providing 'appropriate equitable relief' for 'any' statutory violation" or violation of the terms of the plan. *Varity*, 516 U.S. at 512. It is designed to afford "relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Ibid.* In a suit under 502(a)(1)(B), but not one under Section 502(a)(3), a participant must point to a provision of the plan that, when read in light of a statutory requirement or prohibition, entitles him or her to benefits. Respondents have done so here, and their claim thus arises under Section 502(a)(1)(B). There accordingly is no need to rely on Section 502(a)(3).

Petitioners argue (Pet. 13) that Section 502(a)(1)(B) must be limited to claims that do not refer to the provisions of ERISA because Congress did not intend for state courts "to interpret and apply the provisions of ERISA." That is incorrect. "[S]tate courts" are "presumptively competent[] to adjudicate claims arising under the laws of the United States." *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990); see U.S. Const. Art. VI, Cl. 2. Many ERISA plans contain clauses that incorporate ERISA or require that their terms be read consistently with ERISA. It can hardly be said that allowing state courts to award benefits in light of those provisions runs contrary to the federal scheme, and it would make little sense for state-court jurisdiction to turn on whether

such incorporation of ERISA's requirements is explicit or implicit.[4]

Significantly, petitioners argued to both the district court and the court of appeals that respondents had no remedy under Section 502(a)(1)(B) or 502(a)(3), even if plan terms were clearly illegal under ERISA. See, *e.g.*, Pet. App. 12a, 64a; see also *id.* at 67a (petitioners' position would "permit plan terms that blatantly violated ERISA to stand unchallenged"). They now contend that respondents could seek equitable reformation of the Plan under Section 502(a)(3) and then seek benefits under the "reformed" plan under Section 502(a)(1)(B). There is no evident reason why a participant or beneficiary must proceed in two steps, or invoke two statutory provisions, rather than one. Petitioners suggest that the relief of reformation might be denied at the first step on the ground that it would not be "equitable" and "appropriate." Pet. 18 n.7. The fact that petitioners' position thus would either eliminate jurisdiction or sub-

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[4] The legislative history on which petitioners rely (Pet. 20-21) does not compel a different result. The broad text of Section 502(a)(1)(B), combined with the statutory requirement that plans be administered consistent with ERISA, makes clear that Congress did not intend courts considering Section 502(a)(1)(B) to ignore the provisions of ERISA. Moreover, immediately following the language petitioners cite, the Conference Report states that "[a]ll such actions in Federal or State courts are to be regarded as arising under the laws of the United States in a similar fashion to those brought under section 301 of the [LMRA]." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974). This Court has construed Section 301 to require courts to read the substantive provisions of the labor laws into the terms of collective bargaining agreements, *Kaiser Steel Corp.*, 455 U.S. at 76-79, and has recognized that Congress intended state courts to interpret the federal labor laws in Section 301 cases, see *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 506-514 (1962).

stantially restrict relief in cases involving plan terms that ERISA renders illegal weighs heavily against their interpretation. Because a plan *administrator* is obligated to disregard plan terms that are inconsistent with ERISA (see pp. 10-11, *supra*), there is no reason to believe that Congress intended to allow a *court*, when reviewing a plan's decision denying benefits, to decline to enforce the applicable provisions of ERISA.

3. Contrary to petitioners' contention (Pet.13-19), the lower courts have not divided on whether a claim like respondents' may be brought under Section 502(a)(1)(B). The Seventh Circuit has agreed with the court below that the particular type of claim at issue here—that additional plan benefits are due because failure to use the whipsaw calculation violates ERISA—arises under Section 502(a)(1)(B). See *Berger* v. *Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 763 (7th Cir. 2003). No court of appeals considering this type of claim has disagreed, and no court of appeals has adopted the radical contention that courts may not consider the requirements of ERISA in suits for benefits under Section 502(a)(1)(B).

The decision below does not conflict with the Fifth and Eighth Circuit decisions petitioners cite (Pet. 15-16). In *Ross* v. *Rail Car Am. Group Disability Income Plan*, 285 F.3d 735 (8th Cir.), cert. denied, 537 U.S. 885 (2002), a participant claimed that two amendments to a disability plan were adopted through an improper procedure, and he sought "to reform the Plan by obtaining a declaration that the purported 1990 and 1991 amendments are void." *Id.* at 739-740. Although the participant ultimately would have been entitled to additional benefits if the plan were reformed, the court determined that his claim was one for "equitable relief" under Sec-

tion 502(a)(3) because "the vehicle" he chose to reach that outcome, and the declaratory relief he sought, was "invalidation of the plan amendments." *Id.* at 740-741. *Ross* concerned a fundamentally different type of claim than the claim at issue here—a declaration that the plan must be reformed, rather than monetary relief representing additional plan benefits. And the *Ross* Court did not hold that a claim for benefits in which a court would have to interpret the plan terms in light of ERISA could not be brought under Section 502(a)(1)(B).

The decision below likewise does not conflict with *Carrabba* v. *Randalls Food Markets, Inc.*, 252 F.3d 721 (5th Cir.), cert. denied, 534 U.S. 995 (2001). The *Carrabba* court's one-paragraph affirmance of the district court's decision, which did not even mention Section 502(a)(1)(B), *id.* at 721-722, is not the type of decision that gives rise to a circuit conflict warranting this Court's review. In any event, the district court's decision affirmed in *Carrabba* does not conflict with the decision below. The district court determined that the plan in question was not exempt from ERISA's vesting requirements and then stated, in fashioning a remedy, that "equity would be served in this case if the members of the Class were to be placed in basically the same financial position in which they would be if the employer had complied with" those requirements. *Carrabba* v. *Randalls Food Markets, Inc.*, 145 F. Supp. 2d 763, 766, 770-771 (N.D. Tex. 2000). The district court did not hold that a claim for benefits that relies in part on statutory requirements can never arise under Section 502(a)(1)(B); it simply decided that the plaintiffs' partic-

ular claim, which essentially required reformation of the plan, was equitable in nature under Section 502(a)(3).[5]

Nor is there a conflict between the decision below and the state court decisions petitioners cite. *In re Marriage of Oddino*, 939 P.2d 1266 (Cal. 1997), cert. denied, 523 U.S. 1021 (1998), is entirely consistent with the decision below. There, the court held that it had jurisdiction to determine whether a certain state domestic relations order was a "qualified domestic relations order" under ERISA because the putative beneficiary sought benefits under the terms of the plan. *Id.* at 1268, 1272-1274. The court specifically rejected the argument petitioners now make, stating that "Congress did not in ERISA limit state court jurisdiction to actions in which the provisions of title I of ERISA have no application." *Id.* at 1273.[6]

In *Duffy* v. *Brannen*, 529 A.2d 643 (Vt. 1987), the court held that a participant's claim for benefits under the terms of a plan was "clearly * * * within the scope

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[5] *Todisco* v. *Verizon Communications*, 497 F.3d 95 (1st Cir. 2007), also does not conflict with the decision below. The *Todisco* Court held that a claim for compensatory money damages is not a claim for "equitable relief" under ERISA Section 502(a)(3), *id.* at 99, and a claim for money damages for an oral misrepresentation, where there was no "interpretation [of the plan] under which [the plaintiff] would be eligible for benefits," was not a claim for plan benefits under Section 502(a)(1)(B), *id.* at 97 n.3, 101-102.

[6] In its amicus brief in *Oddino*, the Department of Labor (DOL) disagreed that the beneficiary had brought a claim for benefits under Section 502(a)(1)(B) "merely by seeking an adjudication of plan rights in the context of an otherwise unrelated dissolution proceeding" in state family court. See DOL Amicus Br., *Oddino*, *supra*, 1997 WL 33559420, at *20 (filed Jan. 16, 1997). DOL's position was based on the "unusual set of facts" present in that case, *id.* at *15, and DOL did not contend that a claim for benefits that seeks to have the plan interpreted consistently with ERISA does not arise under Section 502(a)(1)(B).

of state court jurisdiction under § [502](a)(1)(B)," while her claims for statutory penalties for failure to furnish plan documents and for damages for breaches of fiduciary duties were not. *Id.* at 649-651. Similarly, in *Richland Hospital, Inc.* v. *Ralyon*, 516 N.E.2d 1236 (Ohio 1987), the court determined that it had jurisdiction under Section 502(a)(1)(B) to award plan benefits, but not to award extracontractual punitive damages. *Id.* at 1238-1240. In neither case did the court address whether a claim for benefits is one "under the terms of the plan" when the plaintiff relies on both plan terms and the requirements of ERISA, and neither case, therefore, conflicts with the decision below. The remaining state court decisions petitioners cite (Pet. 14-15) are not from the highest courts of the respective States and therefore could not give rise to the type of conflict that warrants this Court's review. See Sup. Ct. R. 10(a). Further review of petitioners' first contention is therefore unwarranted.

B. The Plan Interpretation Question Does Not Warrant This Court's Review

Petitioners also contend (Pet. 22-27) that review is warranted because the court of appeals applied the doctrine of *contra proferentem*, *i.e.*, the doctrine that ambiguous contract language should be construed against the drafter. Petitioner is correct that the courts of appeals have expressed different views on whether the *contra proferentem* principle applies when reviewing an administrator's interpretation of an ERISA plan for abuse of discretion. See, *e.g.*, *Carolina Care Plan Inc.* v. *McKenzie*, 467 F.3d 383, 389 (4th Cir. 2006) (applying principle where plan administrator has a conflict of interest, although some other courts of appeals do not do

so), cert. dismissed, 128 S. Ct. 6 (2007), and No. 06-1436 (July 30, 2007). But for three reasons, this case is not an appropriate vehicle to resolve that disagreement.[7]

First, the decision below is ultimately based on the court's conclusion that petitioner's interpretation of the Plan would violate ERISA, not the principle of *contra proferentem*. The court of appeals explained that Section 1.2 of the Plan unambiguously defined each participant's "accrued benefit" as an "annual benefit commencing at normal retirement age." Pet. App. 26a. The court noted that other provisions of the Plan suggested that an early retiree is entitled only to the amount in his hypothetical account, not the actuarial equivalent of an annuity at normal retirement age, but it determined that those other provisions violated ERISA's anti-forfeiture and actuarial-equivalence provisions. *Id.* at 26a-27a. The court also invoked the principle of *contra proferentem* as a basis to ignore those illegal provisions, *id.* at 26a, but that principle had no practical effect, because the court determined that the illegal provisions were unenforceable under ERISA.[8]

Second, even if the result below depended in part on *contra proferentem*, review would not be warranted in this case to address the extent to which the doctrine applies in ERISA cases. The parties did not brief the

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[7] This Court recently denied review of the *contra proferentem* issue in *AT&T Pension Benefit Plan* v. *Call*, 128 S. Ct. 2900 (2008) (No. 06-1398). The same result is appropriate here; in both cases, the courts invoked the principle without any discussion and it was not essential to the courts' ultimate conclusion.

[8] The court of appeals cited its previous decision in *Regents of the University of Michigan* v. *Employees of Agency Rent-A-Car Hosp. Ass'n*, 122 F.3d 336, 340 (1997), but review in that case was de novo, not for abuse of discretion, and the court did not discuss when the *contra proferentem* principle applies in ERISA benefits cases.

issue in the court of appeals, and the court of appeals did not analyze the issue. Because this Court does not ordinarily address issues that were not pressed or passed upon in the court of appeals, see *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999), this case does not furnish a suitable vehicle for considering when or whether *contra proferentem* applies in an ERISA benefits case.

Third, resolution of the *contra proferentem* issue would in any event be unlikely to affect the outcome of this case. The court of appeals held, in agreement with the three other circuits that have considered the issue, that the whipsaw calculation is required for cash balance plans to avoid violation of ERISA's anti-forfeiture and actuarial-equivalence provisions. See *Berger*, 338 F.3d at 759-763; *Esden* v. *Bank of Boston*, 229 F.3d 154, 162-168 (2d Cir. 2000), cert. dismissed, 531 U.S. 1061 (2001); *Lyons* v. *Georgia-Pac. Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1241-1252 (11th Cir. 2000), cert. denied, 532 U.S. 967 (2001). Petitioners do not explain how resolution of the *contra proferentem* argument in their favor could affect the resolution of their case in light of the court of appeals' conclusion that the Plan terms upon which they rely are illegal. Moreover, the underlying whipsaw issue is of diminishing importance in light of the 2006 amendments to ERISA. See n.2, *supra*. Further review on the second issue therefore is unwarranted as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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